Applicant Details

First Name	**Quinn**
Middle Initial	**R**
Last Name	**Evangelakos**
Citizenship Status	**U. S. Citizen**
Email Address	**qevangelakos@jd24.law.harvard.edu**
Address	**Address** Street **11 Gray Street Apt 7** City **Cambridge** State/Territory **Massachusetts** Zip **02138** Country **United States**
Contact Phone Number	**6469571067**

Applicant Education

BA/BS From	**Harvard University**
Date of BA/BS	**May 2020**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 23, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Human Rights Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Habeas, Prison Litigation**

Recommenders

Nelson, Kristen
kristen.nelson@sperojustice.org
Bowie, Nikolas
nbowie@law.harvard.edu
617-496-0888
Crespo, Andrew
acrespo@law.harvard.edu
617-495-3168

References

Professor Nikolas Bowie, Harvard Law School,
nbowie@law.harvard.edu, (617) 496-0888
Professor Andrew Crespo, Harvard Law School,
acrespo@law.harvard.edu, (617) 495-3168
Kristen Nelson, Spero Justice Center, kristen.nelson@sperojustice.org,
(617) 501-8658

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Quinn Risa Evangelakos
Qevangelakos@jd24.law.harvard.edu | 646 957 1067 | 11 Gray Street Apt 7, Cambridge MA 02138

June 21, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501

Dear Judge Christen,

I am writing to apply for a clerkship in your chambers for 2025. I am a rising third-year student at Harvard Law School and am committed to pursuing public interest work, specifically public defense work, after law school.

Two particular experiences in law school have sharpened my legal analysis, research, and writing skills, and inspired further legal learning. As a research assistant for Professor Bowie, I have completed several memos on judicial supremacy, statutory language, and local government law. Working for the Institute to End Mass Incarceration, first as a clinical student and then continuing on, I have been lucky to be able to join conversations about using creative legal arguments in advocacy.

Attached please find my resume, law school transcript, undergraduate transcript, and writing sample. The following people will submit letters of recommendation on my behalf.

- Professor Nikolas Bowie, Harvard Law School, nbowie@law.harvard.edu, (617) 496-0888
- Professor Andrew Crespo, Harvard Law School, acrespo@law.harvard.edu, (617) 495-3168
- Kristen Nelson, Spero Justice Center, kristen.nelson@sperojustice.org, (617) 501-8658

I would welcome an opportunity to interview with you. If there is any additional information I can provide, please let me know. Thank you for your time and consideration.

Sincerely,

Quinn Evangelakos

Quinn Risa Evangelakos
Qevangelakos@jd24.law.harvard.edu | 646 957 1067 | 11 Gray Street Apt 7, Cambridge MA 02138

Education

Harvard Law School, Cambridge, MA *Class of 2024*
Candidate for J.D.
Harvard Defenders, Team Leader (represent clients at show-cause hearings; lead weekly meetings to support other students)
Professor Niko Bowie, Research Assistant
Human Rights Journal (subsite and galley-proofing)

Harvard College, Cambridge, MA *Fall 2016 - Spring 2020*
A.B., *cum laude* in Social Studies; Citation in Mandarin
Room 13, Counselor (provided anonymous and confidential peer counseling to Harvard undergraduates)
Chinatown Citizenship, Co-Director (led 24 volunteers preparing Chinese-speakers for U.S. citizenship test)
First-Year Outdoors Program, Leader (co-led first-years on backpacking trips for college pre-orientation)

The Brearley School, New York, NY *Fall 2003 - Spring 2016*

Work Experience

Public Defenders Service for the District of Columbia, Washington DC *Summer 2023*
Legal Clerk, Trial Division
Assist with legal research and writing. Practice oral advocacy skills. Meet with clients.

Spero Justice Center, Denver, CO *Summer 2022*
Legal Intern
Drafted a clemency petition supplement. Assisted with legal research, archival research, editing, and writing for a brief. Met with clients and family members. Observed court proceedings. Reviewed records. Assisted editing video interviews.

Southern Center for Human Rights, Atlanta, GA *September 2020 – August 2021*
Investigator in the Impact Litigation Unit
Represented incarcerated people before the Alabama Board of Pardons and Paroles and assisted with resentencing cases. Conducted confidential interviews with incarcerated people. Assisted lawyers with litigation-related research. Reviewed records. Drafted advocacy letters. Funded by a Richardson Fellowship, awarded to pursue a year in public service.

Democratic Knowledge Project at the Safra Center for Ethics, Cambridge, MA *Fall 2018 - Summer 2020*
Research Assistant for Professor Danielle Allen
Wrote teacher and student-facing classroom materials for new eighth grade civics curricula in Massachusetts schools. Partnered with teachers implementing new eighth grade curricula and implemented changes based on their feedback.

Office of New York State Assembly Member Michael Blake, Bronx, NY *Summer 2019*
Intern
Managed 6 high school interns. Created and implemented orientation curriculum. Served constituents; organized office-wide events with community. Drafted speeches. Funded by a Director's Internship at the Institute of Politics.

Historic Restoration, Sitka, AK *Summer 2018*
Crew Member
Volunteered to preserve and restore Sheldon Jackson Campus (a national landmark housing Sitka Fine Arts Camp). Learned and employed advanced skills in construction, preservation, and safety.

Public Defenders Service for the District of Columbia, Washington DC *Summer 2017*
Intern Investigator, Criminal Law Internship Program
Worked closely with another intern to assist an attorney in and out of courtroom. Interviewed clients and witnesses. Wrote investigative memoranda. Advocated for and worked with clients. Helped with basic needs in jail.

Interests and Skills

Mandarin (advanced), Hiking, Skiing, and Cello

Harvard Law School

Date of Issue: June 8, 2023
Not valid unless signed and sealed
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Record of: Quinn Risa Evangelakos
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 3 Greiner, D. James	P	4
1001	Contracts 3 Lessig, Lawrence	P	4
1006	First Year Legal Research and Writing 3A Solow-Niederman, Alicia	P	2
1003	Legislation and Regulation 3 Stephenson, Matthew	H	4
1004	Property 3 Brady, Maureen	P	4
	Fall 2021 Total Credits:		18

Winter 2022 Term: January 04 - January 21

1051	Negotiation Workshop Heen, Sheila	CR	3
	Winter 2022 Total Credits:		3

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 3 Bowie, Nikolas	H	4
2048	Corporations Hanson, Jon	P	4
1002	Criminal Law 3 Lewis, Christopher	H	4
1006	First Year Legal Research and Writing 3A Solow-Niederman, Alicia	H	2
1005	Torts 3 Ziegler, Mary	P	4
	Spring 2022 Total Credits:		18
	Total 2021-2022 Credits:		39

Fall 2022 Term: September 01 - December 31

2020	Capital Punishment in America Steiker, Carol	P	4
2050	Criminal Procedure: Investigations Crespo, Andrew	P	4
2079	Evidence Rubin, Peter	H	2
8026	Mediation Clinic Mondell, Catherine	H	1
3025	Mediation Clinical Seminar Mondell, Catherine	H	1
	Fall 2022 Total Credits:		12

Fall-Spring 2022 Term: September 01 - May 31

7002W	Independent Writing Steiker, Carol	H	2
3500	Writing Group: Criminal Law, Procedure, and Policy Steiker, Carol	CR	1
	Fall-Spring 2022 Total Credits:		3

Winter 2023 Term: January 01 - January 31

2249	Trial Advocacy Workshop Sullivan, Ronald	CR	3
	Winter 2023 Total Credits:		3

Spring 2023 Term: February 01 - May 31

2000	Administrative Law Vermeule, Adrian	H	4
2651	Civil Rights Litigation Michelman, Scott	H	3
8051	Institute to End Mass Incarceration Clinic Crespo, Andrew	H	3
3003	Institute to End Mass Incarceration Clinical Seminar Crespo, Andrew	H	2
	Spring 2023 Total Credits:		12
	Total 2022-2023 Credits:		30

Fall 2023 Term: August 30 - December 15

2597	Crimmigration: The Intersection of Criminal Law and Immigration Law Torrey, Philip	~	2
2086	Federal Courts and the Federal System Goldsmith, Jack	~	5
	Fall 2023 Total Credits:		7

Fall 2023 - Winter 2024 Term: August 30 - January 19

8002	Criminal Justice Institute: Criminal Defense Clinic Umunna, Dehlia	~	5

continued on next page

Harvard Law School

Record of: Quinn Risa Evangelakos

Date of Issue: June 8, 2023
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2261	Criminal Justice Institute: Defense Theory and Practice Umunna, Dehlia	~	4
	Fall 2023 - Winter 2024 Total Credits:		9
	Spring 2024 Term: January 22 - May 10		
2234	Taxation Warren, Alvin	~	4
	Spring 2024 Total Credits:		4
	Total 2023-2024 Credits:		20
	Total JD Program Credits:		89

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program

Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates

LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Harvard University

Cambridge, Massachusetts 02138

Harvard College

Evangelakos, Quinn R
Admitted in 2016
Good Academic Standing

Lowell House
HUID: **71238431**

Degrees Awarded

Degree: Bachelor of Arts
Date Conferred: 05/28/2020
Degree Honors: Cum Laude in Field
Degree Honors: Recommended for Honors

Academic Program

Concentration: Social Studies
Language Citation: Chinese

Beginning of Harvard College Record

2016 Fall

Course	Description	Earned	Grade
EXPOS 20	Expository Writing 20	4.000	B+
Course Topic:	HIV/AIDS in Culture		
FRSEMR 60H	Faith and Fiction in American History	4.000	SAT
LPS A	Foundational Chemistry and Biology	4.000	A-
STAT 104	Introduction to Quantitative Methods for Economics	4.000	A-

2017 Spring

Course	Description	Earned	Grade
CHNSE 120B	Intermediate Modern Chinese	4.000	A
ENGLISH 178X	The American Novel: Dreiser to the Present	4.000	A-
FRSEMR 26J	The Universe's Hidden Dimensions	4.000	SAT
LIFESCI 1B	An Integrated Introduction to the Life Sciences: Genetics, Genomics, and Evolution	4.000	A-

2017 Fall

Course	Description	Earned	Grade
CHNSE 130A	Pre-Advanced Modern Chinese	4.000	A
ECON 10A	Principles of Economics	4.000	A-
HIST-LIT 90CX	Stop Making Sense: America in the 1980s	4.000	A-
SOC-STD 10A	Introduction to Social Studies	4.000	A-

2018 Spring

Course	Description	Earned	Grade
CHNSE 130B	Pre-Advanced Modern Chinese	4.000	A
RELIGION 13	Scriptures and Classics: Introduction to the History of Religion	4.000	A-
SOC-STD 10B	Introduction to Social Studies	4.000	A-
SOC-STD 40	Philosophy and Methods of the Social Sciences	4.000	A-

2018 Fall

Course	Description	Earned	Grade
CHNSE 140A	Advanced Modern Chinese	4.000	A
COMPSCI 50	Introduction to Computer Science	4.000	SAT
SOC-STD 98LF	Globalization and the Nation State	4.000	A-
SOC-STD 98QB	Democracy and Education in America	4.000	A-

2019 Spring

Course	Description	Earned	Grade
GOV 10	Foundations of Political Theory	4.000	A
GOV 1295	Comparative Politics in Latin America	4.000	A
SOC-STD 98CL	Law and American Society	4.000	A
US-WORLD 29	Designing the American City: Civic Aspirations and Urban Form	4.000	A

2019 Fall

Course	Description	Earned	Grade
EDU S105	Philosophy of Education	4.000	A
Notation:	Include in Credit & GPA		
ENGLISH CPY	Fiction Writing: Workshop	4.000	A
ENGLISH 170A	High and Low in Postwar America	4.000	A-
SOC-STD 99A	Tutorial - Senior Year	4.000	SAT

2020 Spring

2020 Spring semester significantly disrupted starting 10 March 2020 due to Coronavirus COVID-19 outbreak. Mandatory Satisfactory (SEM)/Unsatisfactory (UEM) grading in effect. Other grades appearing in this semester were submitted prior to 10 March.

Course	Description	Earned	Grade
HIST 14N	The Uses and Abuses of the Past: History in American Public Life	4.000	SEM
HIST 1001	The War in Vietnam	4.000	SEM
SOC-STD 99B	Tutorial - Senior Year	4.000	SEM
SUP 715	Morals, Money and Movements: Criminal Justice Reform as a Case Study	4.000	SEM
Notation:	Include in Credit only		

Harvard College Career Totals

Cum GPA:	**3.793**	**Cum Totals**	**128.000**	**96.000**

End of Harvard College Record

Date Issued: Jul 17, 2020
Page 1 of 1

Michael P. Burke, Registrar
Not official unless signed and sealed

June 21, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I am pleased to enthusiastically recommend Quinn Evangelakos, a member of the class of 2024 at Harvard Law School, for a clerkship with your chambers.

I am the Executive Director of Spero Justice Center, a small, new legal nonprofit based in Denver, Colorado whose mission is to eradicate unjust and extreme sentencing practices in Colorado and beyond. Quinn was Spero Justice Center's first-ever legal intern during the summer of 2022. As an initial matter, the fact that Quinn was eager to intern with a small, relatively unknown nonprofit is in itself evidence of several of her admirable qualities, including her curiosity, willingness to take risks, and ability to take initiative.

Quinn helped us with a variety of tasks over the course of the summer, and she genuinely excelled at all of them. As some highlights, she assisted with some complex legal research pertaining to an appellate brief we were working on as part of a systemic litigation project, helped craft a mitigation narrative and video for a client who is a survivor of gender-based violence and is serving a sentence of life without parole, reviewed and analyzed trial transcripts in another postconviction case for a client who was excessively sentenced as a habitual offender, and did a significant amount of work on a clemency petition for a client who had been sentenced to over 100 years for a nonhomicide at age 18.

Quinn always completed her assignments on time and was able to manage several different projects at once. Her work product was of a very high quality and she understood complex facts and legal doctrines well.

The clemency petition Quinn assisted with is perhaps the best example of how she spent her time with us. We gave this case to her at the outset of her internship as one of her major projects for the summer. We encouraged her to be independent and creative with it. Quinn did an excellent job establishing lines of communication with multiple family members, soliciting letters of support from them, spending time with the client to learn his life story, researching the legal doctrines at issue in the client's case, and digesting legal materials. She worked independently, checking in with us periodically with questions when appropriate, but also taking a significant amount of initiative without direction as well (to our great delight).

At the conclusion of her internship, she crafted a clemency petition containing a persuasive narrative that the client's excessive sentence was the result of poor representation at the trial and appellate levels and the interplay of two complicated and confusing Colorado-specific legal doctrines that produced an unintended, extreme result. Her draft of the petition was excellent, and it is not an exaggeration to say that we could not have taken on the case, let alone turned it around so quickly, without her assistance.

Throughout the internship, Quinn also demonstrated excellent interpersonal skills. She sought guidance and asked follow-up questions when appropriate, but was also a self-sufficient intern who was very internally motivated by the work. She was very pleasant company and we enjoyed having her in the office and bringing her along to prison visits, court appearances, and the like. She expressed a great deal of interest about our work and the origins of our organization, asked meaningful questions, and seemed to truly appreciate the complexity of this unique work as well.

I am a 2004 graduate of Harvard Law School, and had the pleasure of clerking for U.S. District Judge Myron Thompson, so I am familiar with the qualities this job requires. I can say without hesitation that Quinn would be an outstanding addition to your chambers.

I would be pleased to answer any additional questions if it would be at all helpful to your decision-making process. I can be reached either via email at kristen.nelson@sperojustice.org, or by phone at (303) 495-1153.

Sincerely,

Kristen M. Nelson

Executive Director, Spero Justice Center

June 22, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I write to recommend Quinn Evangelakos for a clerkship in your chambers. Quinn is insightful, skilled at understanding and deploying legal doctrine, and a fast, confident researcher. She will make an excellent clerk.

I met Quinn when she took my constitutional law class in the spring of 2022. The class met three days per week, and toward the end of each class, I posed a question based on a current event that related to the material we just discussed. The questions asked students to offer their understanding of what is the law—say, by assessing a novel provision of the Infrastructure Act, how the president might constitutionally respond to Russia's invasion of Ukraine, or how a federal court might analyze Arkansas's ban on gender-affirming care. I also asked students to offer their understanding of what the law should be. Although the conversation would typically begin in class, most of it took place afterward on online discussion boards in which the students could respond to one another.

Quinn's responses to the daily questions were excellent. Quinn plans to become a public defender, and she cares deeply about structural injustices in the legal system. This passion carried through the range of doctrines we discussed in class, from Congress's taxing power to presidential unilateralism. Although she is quiet and understated in person, on the page she was rigorous, witty, and ready to defend her arguments. Yet she also got along with the other students in her class, including students who disagreed with her. I thought of her as an ideal participant and enjoyed seeing when she engaged with a particular prompt.

Quinn also did well on the final exam. My eight-hour final exam asked students three questions. The first question asked how the Biden administration could modify its regulatory interpretations of the American Rescue Plan Act of 2021 in light of lawsuits challenging the Act's grant of aid to states (on ambiguity and coercion grounds) and "socially disadvantaged farmers" (on equal-protection grounds). The second question asked about the scope of the Biden administration's unilateral power to admit refugees. And the third asked students to analyze the recently leaked opinion in Dobbs and explain how the opinion might change constitutional doctrine beyond abortion bans.

Quinn's answers to the three questions were accurate, well developed, and concise. Her response to the refugee question was particularly thoughtful. I asked about the possibility that a future Congress might restrict the president's power to admit new refugees in light of the large number of people seeking asylum at the border. Quinn attacked the statute in virtually every conceivable way, pointing out that it offered no procedural safeguards before someone over the limit would be expelled; that it was inconsistent with treaties the United States has ratified; and that it was inhumane. But she didn't rest on the normative criticism of the law. She also outlined a legal method by which the president could comply with the statute but dedicate enforcement resources elsewhere in a move similar to the real-life Deferred Action for Childhood Arrivals program. It was a legally rigorous answer that also grappled with Quinn's normative priors in a nuanced way.

After the semester ended, I hired Quinn to work as a research assistant throughout 2022 and 2023. I offered Quinn a wide range of assignments, all of which she performed quickly and diligently. For a book that I am coauthoring, she wrote thorough literature reviews of historians and legal scholarship that have considered how Marbury was understood in the nineteenth century. For consulting work that I have done for sitting legislators, she collected and analyzed statutes passed in the last century in which Congress incorporated alternatives to judicial review. For work I have done to change the city of Cambridge's charter, she researched legal theory on sortition, representative mayors, and other forms of democratic representation. In total, she completed about a dozen or so assignments. I relied heavily on her work, which I found accurate, detailed, and responsive to my questions.

Quinn is interested in clerking because she plans to become a public defender after graduating. She is committed to making the legal system more just, and she is passionate about improving the law. She is equally capable of analyzing and providing recommendations for how to understand doctrines that she disagrees with; she is a careful scholar and researcher. I recommend her with enthusiasm for a clerkship.

Sincerely,
Nikolas Bowie
Louis D. Brandeis Professor of Law
Harvard Law School

Nikolas Bowie - nbowie@law.harvard.edu - 617-496-0888

HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

ANDREW MANUEL CRESPO

Morris Wasserstein Public Interest Professor of Law 617.495.3168
Founder and Executive Faculty Director, Institute to End Mass Incarceration acrespo@law.harvard.edu

June 22, 2023

The Honorable Morgan Christen
United States Court of Appeals for the Ninth Circuit
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen,

It is my pleasure to write to you in support of Quinn Evangelokos's application to serve as a law clerk in your chambers. I know Quinn exceptionally well, having taught and worked with her in two related but distinct settings over the course of the past academic year: She was a student in my upper-level Criminal Procedure course and was also one of the eight students whom I admitted to the clinic that I direct at Harvard Law School as a component of the Institute to End Mass Incarceration. The first of these settings is a traditional law school academic course, in which Quinn showcased her talents as a doctrinal analyst. The second setting more closely approximates a judge's chambers than most other educational settings on our campus: Quinn was one of four students on a team I directly supervised. I worked intensively alongside her and her colleagues over the course of many months as we collaborated on a complex, forty-page briefing memorandum analyzing complicated areas of property law and constitutional law, in the context of a factually intensive legal campaign. The experience reminded me frequently of my own years working as a clerk for and alongside my own former judges. And based on my time working with Quinn, I can say with confidence that she is hardworking, thoughtful, and committed. It is my pleasure to recommend her to you.

I first came to know Quinn when she was a student in my Criminal Procedure Investigations class during her 2L year. The course is one of our school's larger classes, with one hundred and thirty-five upper-level students enrolled, many of whom serve on the *Law Review* and go on to graduate *magna cum laude.* In that impressive setting, Quinn stood out as a very strong student. Her responses to Socratic questioning were careful, and thoughtful, always demonstrating her attentiveness to the details of the case.

Based in part on her performance throughout the semester, I selected Quinn the following semester to be one of only eight students in a clinic that I direct at Harvard Law School

as a component of the Institute to End Mass Incarceration. The clinic is designed to immerse students in the design and execution of a high-impact strategic litigation campaign undertaken in coordination with a coalition of organizers. Our role in the coalition is to map out innovative legal strategies that could help to advance the coalition's organizing and campaign goals across various dimensions—from courtroom success, to narrative framing, to mobilizing organizing efforts. The students were required to demonstrate creative and strategic thinking, to work collaboratively on team-based projects, and to throw themselves into a semester-long writing project that included multiple rounds of drafting and intensive revision under the direct supervision of me and my co-instructor, the Institute's Executive Director, Prema Dharia.

We selected the eight enrolled students out of dozens of impressive applicants. Together, we operated as a full-time law office to develop a comprehensive and detailed set of legal strategy memos that offered roadmaps for different ways in which law might be leveraged in service of the coalition's goal of halting construction of a new prison in central Appalachia. The substantive areas of law canvassed by the students were wide-ranging, covering fields such as property law, eminent domain, administrative law, environmental law, and federal appropriations law. The clinic is leanly staffed—just two instructors and the students, with the instructors serving as supervising attorneys and the students serving as the lawyers on the project under our direct supervision. To make room for this project, I clear out all of my other teaching and writing responsibilities for the semester and work with the students full time on our campaign.

As you might imagine, working with students in such an intensive way over the course of a semester gave me a unique insight into their personalities, aptitudes, and strengths. In fact, as I told the students multiple times, the relationships developed between students and supervisors in our shared work felt very much like the relationships that I had previously developed with the judges and Justices I clerked for during my three years as a law clerk. The time I spent working with Quinn in that special setting confirmed my sense that she will be an very talented lawyer and, for the same reasons, will be a very strong law clerk. She is diligent, professional, and analytical. Her work product throughout the semester consistently showcased these strengths.

Beyond all of that, Quinn is also a delightful person. In the clinic, she was a generous and thoughtful team player. As for her strength of character, I will note that Quinn's transcript does not have the unbroken string of Hs that a small handful of our students have been able to assemble. But she does have something quite impressive: a track record of steady improvement in her grades. Having gotten a slow start myself during my first semester at Harvard, I know firsthand the blow it can have to one's confidence, and the resilience it takes to pull around better grades each following semester, as Quinn has. Beyond perseverance and resilience, Quinn is also someone who has impressed me with her

evident commitment to serving the public interest, and to criminal justice work in particular. That commitment comes through in her words and in her deeds, as she speaks passionately about the ends to which she intends to devote her considerable talents as a lawyer. Already, she has set herself out along that path, in both her clinical work and in her work before and during law school at the Southern Center for Human Rights, the Spero Justice Center, and the D.C. Public Defender Service (where I once worked, and which know to be a highly competitive and sought after summer law school position).

In sum, it is my pleasure to recommend Quinn to you with enthusiasm. I am confident that she will be a wonderful clerk. I hope you will not hesitate to contact me if you have any questions about her candidacy.

Sincerely,

Andrew Manuel Crespo

Quinn Risa Evangelakos
Qevangelakos@jd24.law.harvard.edu | 646 957 1067 | 11 Gray Street Apt 7, Cambridge MA 02138

WRITING SAMPLE

Drafted Spring 2023 under the supervision of Professor Carol Steiker.

The attached is a 22-page excerpt of a 36-page paper. The two excluded sections are a table identifying each individual state punishment provision and a rehearsal of counterarguments and responses to them. The section titles remain in the table of contents to show structure, but because the pages have been excluded the reference numbers read "Error! Bookmark not defined." Footnote 1 notes thanks to Professor Steiker and the other students in my writing group, together with whom I discussed general ideas and how to write a paper; no written or specific edits were given.

Quinn Evangelakos

The Eighth Amendment By Any Other Name:
Why State Punishment Provisions Make Progressive Sentencing Reforms Retroactive[1]

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[1] Great thanks are due to Professor Carol Steiker not only for supervising this paper and providing invaluable feedback and instruction, but also for teaching her Capital Punishment in America course, which much of the paper and particularly the Eighth Amendment Jurisprudence section draws upon. Enormous gratitude is also due to Kristen Nelson and Dan Meyer of Spero Justice Center, whose cases and general thoughtfulness about the law gave rise to the ideas behind this paper. Thank you for letting me be a member of the team. Thanks also to Aidan Calvelli, Guy Rubinstein, Farris Peale, Gene Chang, Layla Kousari, Alex Brown, Becca Scribner, Kevin Bendesky, Ellie Olsen, and Morgan Sperry for their thoughts and advice.

I. Introduction

Mass incarceration is attacking the United States from the inside out. A system that supposedly seeks to keep people safe has proven its inherent ability to tear apart communities and families, to inflict physical, economic, mental, and emotional violence on individuals, and to disproportionately target poor people and people of color.[2] And our criminal legal system charges taxpayers more than $260 million a year to propagate these problems.[3] In recent years, as the crimes of the criminal legal system become visible to larger swaths of people, the calls for reform have become more and more widespread. Across the political spectrum, people have come together on this issue.[4] Republicans and Democrats alike, some of whom were even personally involved in lengthening sentences in the 1990s, have begun to propose progressive sentencing legislation.[5] Unfortunately, decarceration is a difficult task. Who should be released? How can it be lawfully done? How can politicians change sentencing schemes without being tagged as "soft on crime"? Many legislative reform acts are only prospective due to political pressures.[6]

[2] The United States criminal legal system incarcerates nearly two million people. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POLICY INITIATIVE (2022), https://www.prisonpolicy.org/reports/pie2022.html. The United States is an international outlier, holding nearly 25% of the world's incarcerated population and less than 5% of the world's population. *End Mass Incarceration*, BRENNAN CENTER FOR JUSTICE (April 21, 2023, 10:12 AM), https://www.brennancenter.org/issues/end-mass-incarceration.

[3] *Id.*

[4] Michael Barone, *Conservatives Backtrack on Long Prison Sentences*, AMERICAN ENTERPRISE INSTITUTE (July 24, 2012), https://www.aei.org/articles/conservatives-backtrack-on-long-prison-sentences/.

[5] Josiah Bates, *Criminal-Justice Reform Was a Key Part of President Biden's Campaign. Here's How He's Done So Far*, TIME (March 7, 2022), https://time.com/6155084/biden-criminal-justice-reform/.

[6] Carol S. Steiker & Jordan M. Steiker, *Little* Furmans *Everywhere: State Court Intervention and the Decline of the American Death Penalty*, 107 CORNELL L. REV. 1621, 1640–47 (2022); *see, e.g.*, Daniel Capetta, *SJC Rules that Raise the Age Legislation is Not Retroactive*, CAPPETTA LAW OFFICES (May 22, 2014), https://www.massachusettscriminallawyer-blog.com/sjc-rules-raise-age-legislation-retroactive/; Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2020*, THE SENTENCING PROJECT (January 15, 2021), https://www.sentencingproject.org/policy-brief/top-trends-in-state-criminal-justice-reform-2020/.

This paper advocates for and explains why the law demands an expansive reading of eighth amendment state corollaries, one that retroactively enforces sentence reform legislation. Part I lays out instructive doctrine, first on federal eighth amendment proportionality analysis, and then on the importance and feasibility of state divergence from the Supreme Court when interpreting their own constitutions. Part II previews how this judicial theory of expansive eighth amendment corollaries would function, why it is the correct legal path, and how state courts are already employing this judgement—using eighth amendment jurisprudence to enforce retroactivity. Part II delineates counterarguments and explains why they cannot overcome the need for retroactivity. Part IV concludes by reiterating the importance of the initiative.

II. Legal Landscape

Eighth Amendment Jurisprudence[7]

Each state constitution includes a corollary of the eighth amendment. Some state constitutions copy exactly the words of the federal constitution's eighth amendment.[8] Others exchange the "and" for an "or," include a requirement of proportionality, or textually differ in some other way.[9] Regardless of the specific text of their state constitutions, state courts each follow federal eighth amendment jurisprudence to some degree, basing decisions on "evolving standards of decency."[10] The tenets of federal eighth amendment jurisprudence, when applied in the context of a state court, suggest retroactive enforcement of prospective sentencing reform.

[7] The analysis of death penalty jurisprudence, particularly in this section, stems from Carol Steiker's Capital Punishment in America class.
[8] *See, e.g.*, AK Const. art. I, sec. 12; WI Const. art. I, sec. 6.
[9] *See, e.g.*, AL Const. art. I, sec. 15; WY Const. art. I, sec. 14; IN art. I, sec. 17 (including an explicit proportionality requirement).
[10] *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

The first question is, what does "cruel and unusual" mean?[11] The Supreme Court has attempted to tell us. The first successful eighth amendment proportionality cases were *Weems v. United States*[12] in 1910 and *Trop v. Dulles*[13] in 1958. While distinguishable from the line of more recent eighth amendment proportionality cases by the international context and focus on United States citizenship presented respectively in each,[14] these early cases establish the fundamental question for eighth amendment proportionality cases: does the sentence accord with "evolving standards of decency."[15] Later cases shed light on how to answer that question.

In reinstating the death penalty in *Gregg v. Georgia*[16] in 1976, the Supreme Court articulated its eighth amendment proportionality analysis. To establish what new standards of decency are, a court looks first at legislative action.[17] Legislators are elected representatives of the public and therefore are best positioned to show the people's will and the public's opinions of morality.[18] Second, members of the court look to their own ideas of decency: what do the justices think of the penological justifications for the sentence?[19]

The Court expands and refines the eighth amendment proportionality analysis presented in *Gregg* in subsequent cases: *Coker v. Georgia*,[20] *Enmund v. Florida*,[21] and *Atkins v. Virginia*.[22]

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[11] U.S. Const. art. I, amend. 8.
[12] *Weems v. United States*, 217 U.S. 349 (1910).
[13] *Trop v. Dulles*, 356 U.S. 86 (1958).
[14] In *Weems*, the Court invalidated a criminal sentence handed down in the Philippines. The Court proclaimed that 15 years of hard labor with constant shackling and government surveillance for the rest of life was too harsh a punishment for forgery. This case, however, is also wrapped up with ideas of U.S. exceptionalism, with U.S. actors wanting to articulate control in the then colony of the Philippines. *Trop v. Dulles* invalidated the stripping of US citizenship for the charge of desertion because the defendant had no other citizenships. The Court declared he could not be left stateless. *Weems*, 217 U.S. 349 (1910); *Trop*, 356 U.S. 86 (1958).
[15] *Trop*, 356 U.S. at 101.
[16] *Gregg v. Georgia*, 428 U.S. 153 (1976).
[17] *Id.* Juries are representative cross-sections of the public, so the Court also looks to jury decisions as signals of evolving standards of decency. *Id.*
[18] *Id.*
[19] *Id.*
[20] *Coker v. Georgia*, 433 U.S. 584 (1977).
[21] *Enmund v. Florida*, 458 U.S. 782 (1982).
[22] *Atkins v. Virginia*, 536 U.S. 304 (2002).

In *Coker*, the Court invalidates the death penalty as a punishment for raping an adult.[23] To reach that opinion, virtually ignoring the gross racial disparities that truly propelled the case, the Court first surveys objective indicia of public opinion: legislative action, how many states allow the death penalty for raping an adult woman,[24] and how frequently juries vote to impose the death penalty for rape.[25] The Court, following the precedent set in *Gregg*, secondly applies a subjective inquiry: their own analysis of whether the punishment is legitimate.[26] In *Enmund*, a case about the appropriateness of the death penalty as punishment for a non-trigger person in a felony murder case, the Court adds a principle of recency in the objective indicia analysis: what have legislatures said on the issue in the past few years.[27]

In applying eighth amendment proportionality analysis in *Atkins*, the Supreme Court built upon the theme of recency in *Enmund*.[28] The Court articulated additional values besides recency in the objective analysis: trend, margin, and political climate.[29] The Court displayed once again that the most important element to examine in eighth amendment analysis is legislative action; courts should follow the legislative consensus when one exists.[30] This is the eighth amendment

[23] *Coker*, 433 U.S. at 600.
[24] *Coker* is the start of Supreme Court justices manipulating the numbers to support their opinion. (Professor Steiker, Capital Punishment in America). Throughout their eighth amendment death penalty proportionality cases, in the objective indicia section of analysis, different justices writing at the same point in time evaluate the takeaways from legislative action very differently. *Coker*, 433 U.S. at 600.
[25] *Id.*
[26] *Id.*
[27] *Enmund v. Florida*, 458 U.S. at 799–800.
[28] *Atkins v. Virginia*, 536 U.S. at 312.
[29] *Id.* "Trend" refers to the consistency of the direction of change. In the case of *Atkins*, 16 states in the last 13 years had outlawed the death penalty for people with intellectual disability. No states were recently legalizing the policy. "Margin" refers to the margin of victory in the state legislatures passing those laws, perhaps even taking into account how many people are represented by the lawmakers voting in favor as opposed to the lawmakers voting against. The political climate calculus referred mainly to the fact that it was difficult and often politically costly to be "soft on crime" in the 1990s, and still state legislatures felt it important to stop this particular punishment. *Id.*
[30] In *Atkins*, the Court also looked beyond representatives or cross-sections of the public. The Court recounted the opinions of medical experts, religious organizations, and the world community, declaring that they reflected a broader world consensus. Scalia vigorously decried this consideration of a broader social consensus, proclaiming that the Constitutional consideration of what was cruel and unusual was bounded to within the United States; the Court was not meant to consider what was unusual in the world. Scalia's dissent highlights why the Court's evolving standards of decency analysis must follow first and foremost the acts of legislatures. *Id.*

proportionality analysis, expanded over time, but based on the initial formula in *Gregg*, the Court continues to apply in death penalty cases.

At the same time, the Court establishes a different analysis for non-death penalty eighth amendment cases. Over a series of cases, *Rummel v. Estelle*,[31] *Hutto v. Davis*,[32] *Solem v. Helm*,[33] and finally *Harmelin v. Michigan*,[34] the Supreme Court articulates a three-part test, with the first question being a threshold question. The first question: is the relationship between the crime and the punishment grossly disproportionate?[35] The word "grossly" makes this a very deferential question.[36] Courts are loathe to second-guess a legislature and call a law *grossly* disproportionate and therefore seemingly irrational. Again, this eighth amendment proportionality jurisprudence specific to non-capital cases places primacy on following the acts of a legislature, so long as the legislatures are acting rationally.[37]

Only if a court decides that a punishment is grossly disproportionate to the crime does it go on to the second and third questions: is the punishment inappropriate considering interjurisdictional comparisons and intra-jurisdictional comparisons?[38] Questions two and three, even though seldom reached, both continue the doctrinal assumption that legislatures are the best signals of evolving standards of decency. Because of the exceptional deference given to legislatures formulating criminal codes in the threshold question, the Court in practice does not

[31] *Rummel v. Estelle*, 445 U.S. 263 (1980).
[32] *Hutto v. Davis*, 454 U.S. 370 (1982).
[33] *Solem v. Helm*, 463 U.S. 277 (1983).
[34] *Harmelin v. Michigan*, 501 U.S. 957 (1991).
[35] *Id.*
[36] *Id. See Ewing v. California*, 538 U.S. 11 (2003).
[37] The court has upheld seemingly absurd sentences under this deferential standard.
[38] To compare interjurisdictionally, a court examines the punishments for similar crimes in different places. To compare intra-jurisdictionally, a court examines punishments for different crimes in the same place. *Harmelin v. Michigan*, 501 U.S. at 986–87.

ever invalidate non-death penalties as disproportionately "cruel and unusual" under the *Harmelin* test.[39]

The different lines of eighth amendment proportionality analysis, death penalty and non-death penalty, are complicated by *Graham v. Florida*[40] and *Miller v. Alabama*,[41] in which the Court applies the traditional death penalty test to non-death sentences and reframes the two tracks as categorical and individualized.[42] While certain death penalty requirements decided under the eighth amendment, like the requirements of individualization in *Woodson*,[43] *Lockett*,[44] and *Eddings*,[45] for instance, are unique to death penalty cases and simply not applied to non-death cases,[46] the proportionality cases from *Coker* to *Enmund* and *Atkins* instrumentalize a

[39] *See Ewing v. California*, 538 U.S. 11 (2003).
[40] *Graham v. Florida*, 560 U.S. 48 (2010).
[41] *Miller v. Alabama*, 567 U.S. 460 (2012).
[42] *Graham* and *Miller* both concerned the constitutional proportionality of sentencing juveniles to a sentence of life without parole (LWOP). Neither were death penalty cases. *Graham* forbid the sentence of LWOP for juveniles convicted of non-capital crimes. *Miller* expanded the holding of Graham, declaring that there could be no mandatory LWOP sentences for juveniles, even juveniles convicted of homicide and the most serious crimes. Neither *Graham* nor *Miller* concerned the death penalty, but both were analyzed under the *Gregg*, *Coker*, *Enmund*, *Atkins* line of cases, rather than the *Rummel*, *Hutto*, *Solem*, *Harmelin* line. Writing the opinions in both *Graham* and *Miller*, Justice Kennedy reframed the two tracks of proportionality analysis as categorical and individual, or non-categorical, rather than death penalty and not, as they had traditionally been deemed. That categorical reframing is not perfect. *Harmelin*, for instance, is the mainstay case for the non-categorical line, but it is about a categorical sentence—mandatory LWOP for simple possession. *Enmund*, on the other hand, would be a hyper specific category of categorical—a death sentence for the non-trigger person in a felony murder with no planned involvement. The categorical reframing may be a new way to organize these precedents, but it might also be a Justice Kennedy special test underpinned by his interest in addressing the problem of sentencing juveniles to die in prison. Another possible reframing of the two tracks of proportionality analysis after *Graham* and *Miller*, although not explicit in any opinion, assigns the *Gregg*, *Coker*, *Enmund*, *Atkins* line for the most severe punishments, and the *Rummel*, *Hutto*, *Solem*, *Harmelin* line for all others. *Graham* and *Miller* concerned LWOP sentences for juveniles, who are wholly exempt from the death penalty under *Roper v. Simmons*. LWOP, or a death in prison sentence, is the most severe punishment a juvenile can face, and the most severe sentence for anyone after the death penalty.
[43] *Woodson v. North Carolina*, 428 U.S. 280 (1976).
[44] *Lockett v. Ohio*, 438 U.S. 586 (1978).
[45] *Eddings v. Oklahoma* 455 U.S. 104 (1982).
[46] Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370–71 (1995).

specific proportionality test that has a non-death parallel and sometimes is itself even applied to non-death cases.[47]

Although the two tests are different, both center legislative consensus as determinative of current standards of decency and generally establish that the eighth amendment requires all punishments, not just severe punishments like the death penalty, are proportional.[48] Defendants and defense-minded communities might call for non-death sentences, especially severe punishments like life sentences, to receive the kind of scrutiny that death penalty sentences receive, hoping for more defendant-friendly results.[49] Separately, however, and most importantly for the argument for retroactive enforcement of legislative sentencing reform, is the fact that both tracks of eighth amendment jurisprudence center the goal of faithfully following legislative action if and when there is clear direction from legislatures.[50]

State Constitutions

Since at least 1977, and gaining momentum in recent years,[51] judges and advocates have expanded rights under state constitutions. Justice William Brennan wrote the canonical text at the end of the Warren Court rights revolution, declaring that based on the direction of the Supreme Court, state courts could and should interpret their own constitutions separately from how the

[47] The death penalty proportionality analysis could have been applied in *Rummel*, *Hutto*, *Solem*, *Harmelin* and the ensuing non-death penalty proportionality cases, likely to more defendant-friendly results. In addition, *Graham* and *Miller* show that sometimes the death penalty proportionality analysis is applied to non-death cases.
[48] *But see Harmelin v. Michigan*, 501 U.S. (Scalia J., declaring that proportionality is not in line with the original meaning of the eighth amendment).
[49] In some ways this is a call for expanding *Graham* and *Miller*, which already applied traditionally death penalty jurisprudence to LWOP sentences.
[50] The death penalty or categorical track of eighth amendment proportionality jurisprudence prizes legislative action by searching for a legislative consensus on the issue before them and following it, as the current standard of decency, if a legislative consensus can be found. The non-death penalty or individualized track of eighth amendment proportionality jurisprudence pivots depending on whether the court thinks there is rational legislative action. If the court determines there is, the court looks no further, entirely following the legislative decision embodied in the act. Only when the court discounts legislative action as irrational do they look to further comparisons, namely other legislatures, to decide whether to overrule a particular sentence.
[51] Sean Rayford, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. TIMES (January 31, 2023), https://www.nytimes.com/2023/01/29/us/abortion-rights-state-constitutions.html.

Supreme Court interpreted the federal Constitution, even if the constitutional provisions were identical.[52]

Even in 1977, there was a widespread history of state courts diverging from Supreme Court interpretations in analyzing state constitutional provisions that are corollaries of the federal Constitution.[53] State courts saw and see themselves as an additional line of defense of civil liberties, particularly regarding criminal issues.[54] It was not until the 1960s that there was meaningful incorporation of the Bill of Rights to the states.[55] Until that time, state courts had to rely on and independently interpret their own constitutional provisions. The expansion of federal rights through incorporation does not negate the need for independent state interpretations of their own constitutions, now known, in counterpoint to following United States Supreme Court interpretations, as divergence.[56]

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[52] In the words of Justice Brennan, "the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law--for without it, the full realization of our liberties cannot be guaranteed." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *see also* Charles Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1140 (1978).

[53] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977). California, Hawaii, Pennsylvania, Maine, South Dakota, Michigan, and New Jersey had already diverged on some aspects of their respective constitutions. The California Supreme Court went further, declaring that Supreme Court opinions on phrases that also appeared in the California Constitution were not even persuasive authority. *Id.* at 495–96; *People v. Disbrow*, 16 Cal. 3d 101, 113, 114–15 (1976). In the case of California, the text of the amendment is also different, see above. The California Bill of Rights promises freedom from "cruel or unusual" punishment rather than just "cruel and unusual punishment. For similar decisions in other states, see *State v. Santiago*, 492 P.2d 657 (Haw. 1971); *Commonwealth v. Triplett*, 341 A.2d 62 (Pa. 1975). *See also* Hans A. Linde, E Pluribus—*Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984) ("Of course we pay attention and respect to Supreme Court opinions on issues common to the two constitutions, and it is to be expected that on many such issues courts will reach common answers. The crucial step for counsel and for state courts, however, is to recognize that the Supreme Court's answer is not presumptively the right answer, to be followed unless the state court explains why not.").

[54] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

[55] *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961).

[56] Jeffrey S. Sutton, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (Oxford University Press 2022).

Federalism is not a one-way ratchet. Federalism offers its citizens protections particular to that form of government. Both the ideals of federalism and our general modes of judicial interpretation support divergence: history, purposivism, experimentation, the federal constitutional avoidance canon, and even sometimes textualism and originalism, oftentimes illicit differences between a state constitutional provision and the federal corollary. Oftentimes the history behind a state constitution is not the same as the history of our federal Constitution.[57] States are different from one another, in geography, population, demographics, history, controversies, etc. State courts are better positioned to account for local distinctiveness than federal bodies. This is especially important in proportionality analyses that focuses on "evolving standards of decency."

Another possibility federalism allows is using states as laboratories of experimentation.[58] States can only be laboratories of experimentation if they diverge from the federal government, if state constitutions are unleashed from the federal Constitution. It is especially important that state constitutional rights can grow and evolve separately from the federal Constitution because federal courts are loath to interpret the Constitution broadly.[59] This truth is codified in the

[57] For example, many of the original 13 states had a constitution before the adoption of our federal Constitution. Our federal Constitution was actually a composite of provisions from already established state constitutions. *Id.*
[58] Jeffrey S. Sutton, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (Oxford University Press 2022).
[59] All courts, state and federal, have a particular duty to enforce constitutional rights. And as history has shown us, there is no one way to interpret a constitutional provision or a statute. There are often dissents; there are changes, re-castings and over-rulings throughout history. The conjecture that the United States Supreme Court must receive the best briefing and therefore make the most informed decisions, dubious at best, even taken at face value does not outweigh all the above-stated propelling arguments in favor of federalism. Shirley Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982). United States Supreme Court analysis is on no account flawless, and even when it is strong, there may be compelling reasons for a state court to interpret their constitution differently—the particularities of the state, the history of the state constitution, etc. State courts that have diverged from the United States Supreme Court have sometimes been accused of being political. The two distinct rejoinders to that accusation are that 1) it is not political to simply disagree with an analysis, or else every dissent is purely political, and that is especially true when there are different factors entering the analysis, and 2) courts are political.

constitutional avoidance canon.[60] Federal courts resist interpreting the Constitution if there is any other possible way to decide the case.[61] They want, whenever possible, to not make sweeping judgements that affect everyone in the country.[62] It is the perfect place for state courts to step in, to make constitutional judgements for their particular states. And indeed, sometimes the text itself is different.[63]

It is perhaps the most sacred duty of the courts to protect the rights of people ignored by the majorities in legislatures. This is the basis for the exalted *Carolene Products* footnote 4.[64] It is the idea that those most in need of judicially protected rights and equities are "the poor, the underprivileged, the deprived minorities."[65] Perhaps no population is more in need of protection than incarcerated people who have been convicted of crimes.[66]

Applying sentencing reform acts retroactively under state eighth amendment corollaries is a situation particularly ripe for state divergence. First, states inherently cannot follow federal eighth amendment jurisprudence because it is based on being a federal body with 50 subparts. States are not divided into distinct sub states; counties do not function for states as states do for the federal government.[67] The United States Supreme Court does a survey of laws in Congress

[60] John F. Manning & Matthew C. Stephenson, LEGISLATION AND REGULATION: CASES AND MATERIALS 384–413, 1219 (Foundation Press, 4th ed. 2010).
[61] Jeffrey S. Sutton, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 124 (Oxford University Press 2022).
[62] *Id.*
[63] *See* state corollaries above.
[64] "Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *U.S. v. Carolene Products Co.*, 304 U.S. 144, n.4 (1938).
[65] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*. 90 HARV. L. REV. 489, 496 (1977).
[66] The very reason that legislatures style sentencing reform prospectively is because it is too politically unpopular to apply any protections to people who have been convicted of crimes. Carol S. Steiker & Jordan M. Steiker, *Little* Furmans *Everywhere: State Court Intervention and the Decline of the American Death Penalty*, 107 CORNELL L. REV. 1621, 1640–47 (2022).
[67] States have sovereignty, legal powers, and responsibilities that mirror that of the federal government. Counties and cities are mostly sub–state bodies that do not mirror sovereign powers in the same way.

and the 50 states during an eighth amendment categorical proportionality analysis to try to find a legislative consensus; states cannot do such a survey.[68] States must look unilaterally at their own state legislature. For states then, a consensus from their own legislature is a legislative consensus as powerful as a majority of states would be for the United States Supreme Court.

Second, principles of comity and federalism do not apply to or limit state court action.[69] Therefore, state courts face the eighth amendment proportionality test for individualized and non-death sentences differently than a federal court does. Federal court invalidation of a state criminal sentence implicates the principles of comity and federalism in a way the state court invalidation by definition cannot. Federal courts resist overruling an act of state legislature to avoid federal interference in the state system. State courts face no such barrier to invalidating state law—that is their duty. Federal restraint in fact purposefully leaves space for state powers, whether that be the state legislature or the state judiciary. Invalidating unlawful sentences under new state sentencing reform is one way for state courts to take up that mantle and avoid concerns of comity.

Third, it is almost inherent in federal eighth amendment jurisprudence that states, more localized bodies, can make stronger proportionality law. The cornerstone of federal eighth amendment proportionality jurisprudence is "evolving standards of decency." Following its colloquial meaning, standards of decency are localized and differ state to state. Following the test as a term of art, it is likewise easier to examine evolving standards of decency in one state than

[68] State courts may look to other states for informative and persuasive arguments, but it is not the same as basing a decision off people and government bodies included within their own sovereign power.
[69] *See* John F. Manning & Matthew C. Stephenson, LEGISLATION AND REGULATION: CASES AND MATERIALS 414–35 (Foundation Press, 4th ed. 2010).

across the country. A legislative consensus in one state is necessarily embodied in each act of law.[70]

Finally, invalidating unlawful sentences because of new sentencing schemes, even if they are announced prospectively, is a way that state courts can protect some of the most vulnerable people, people in prison. Applying sentencing reform retroactively assures incarcerated people are being treated fairly under current law. It is not mercy, but justice.

III. Court-Enforced Retroactivity of Legislative Sentencing Reform

For the reasons discussed in the preceding section, several state courts have extended federal eighth amendment jurisprudence to make prospective legislation retroactive based on a fidelity to legislative will.[71] Several state supreme courts, after their state legislatures had either abolished or circumscribed the use of the death penalty prospectively, extended those changes retroactively.[72] In at least three states, this judicial empowerment of legislative action has been crucial to the abolishing of the death penalty.

The Supreme Court of Connecticut, in *State v. Santiago*, made the legislature's prospective abolishment of the death penalty retroactive citing the legislative activity as a signal of evolving standards of decency.[73] In New Mexico, the Supreme Court invalidated the death sentences of the only two men left on death row after the prospective abolishment of the death penalty.[74] In 2021, in *Oregon v. Bartol*, the Oregon Supreme Court invalidated a death sentence

[70] Unless there is some reason to think a legislative act is suspect or totally irrational. See deferential *Harmelin* standard described above.
[71] William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627 (2021), https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2021/07/58-4_Berry-III-Cruel-and-Unusual-Non-Capital-Punishments.pdf.
[72] *See* Carol S. Steiker & Jordan M. Steiker, *Little* Furmans *Everywhere: State Court Intervention and the Decline of the American Death Penalty*, 107 CORNELL L. REV. 1621, 1623, 1625 (2022).
[73] *State v. Santiago*, 122 A.3d 1 (Conn. 2015).
[74] *Fry v. Lopez*, 447 P.3d 1086 (N.M. 2019).

based on the retroactive application of a new state law curtailing the use of the death penalty.[75] Subsequently, the governor granted clemency to everyone on Oregon's death row, effectively establishing a moratorium.

The Supreme Courts of Connecticut, New Mexico, and Oregon were following general federal eighth amendment jurisprudence to extract general standards of decency from the will of the legislature. This kind of jurisprudence should be extended. When state legislatures lower maximum penalties because of changing society morals, state courts should declare those sentences that exceed the new maximum unconstitutional under the state constitution eighth amendment corollary, thereby making those legislative changes retroactive.

In shorthand, court enforced retroactivity might seem like a court acting faithfully as a junior partner to the legislature. While faithfulness to legislative will is present, the legal duty is a little more nuanced. Courts are adhering to the principle of outlawing cruel and unusual punishment;[76] cruel and unusual is defined by evolving standards of decency;[77] legislative consensus is the most important way of determining the current standard of decency;[78] and so courts should faithfully block punishments that the legislature has declared void. The section above described why the situation was ripe for state divergence. Building on that explanation, the following paragraphs will focus on sketching out the specific doctrinal moves of making prospective sentencing reform retroactive under eighth amendment state corollaries.

As evident in the case studies to follow, the proposal for retroactivity flows from the established proportionality doctrine for the most serious punishments, like death and death in prison, particularly well. As described above, a court's first step in a proportionality analysis for

[75] *State v. Bartol*, 496 P.3d 1013 (Or. 2021).
[76] Or the specific variation of cruel and unusual their state constitution protects against.
[77] *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
[78] *Gregg v. Georgia*, 428 U.S. 153 (1976).

extreme punishment is to count the number of legislatures that allow the particular punishment versus those that do not, taking into account recency and trend. The assumption is that states that allow the punishment deem it proportional, while states disallowing the punishment is evidence the punishment is disproportionate under an evolved sense of decency. When a state court does the analysis, it looks only to its own state legislature for a consensus. A majority of states is a powerful consensus in a 50-state survey.[79] By the same logic, a statute passed in a state legislature, necessarily having support from more than a majority of legislators, represents a consensus. And there is even more reason to hold a legislatively overruled punishment cruel or unusual if it is *newly* disallowed.[80] A new state statute disallowing an old penalty should therefore displace that penalty as cruel and unusual for everyone. The only assumption added to federal eighth amendment jurisprudence in this proposal is that the state is punishing individuals every day that it incarcerates them, and not just on the day it hands out a sentence.[81]

Though traditionally less defendant friendly, the jurisprudence of the individualized or non-death track also leads to the doctrine of applying prospective sentencing reform retroactively. The first step under *Harmelin* is to ask whether the legislature-created punishment is grossly disproportionate. The question of *grossly* disproportionate is a low bar of rationality. If the legislature has acted rationally, their sentencing scheme is lawful and the analysis ends. Only if the Court feels that the legislature has no possible basis for their actions and therefore cannot be lawfully representing the people's will, does the Court continue the analysis. Under this analysis, like under the death penalty or categorical track analysis, the legislature is supreme

[79] *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005).
[80] This reasoning tracks the federal eighth amendment jurisprudence and how the test counts legislative acts of the states in deciding if a punishment is cruel and unusual. The idea of recency can be traced back to *Atkins*. *Atkins v. Virginia*, 536 U.S. 304 (2002).
[81] Some advocates go further, suggesting that courts can and should invalidate any sentence that no longer seems to convincingly serve a punishment rationale. Michael L. Zuckerman, *When A Prison Sentence Becomes Unconstitutional*, 111 GEO. L. J. 281, 300 (2022).

when there is a clear consensus. A doctrine that traditionally almost never provides relief for incarcerated people because of its fidelity to the legislative will should have reverse effects if applied equally in the circumstance of progressively changing sentencing laws.

Perhaps because of the traditional skew in favorability for defendants between the death penalty or serious punishment track and that defined as non-death penalty and individualized, states have applied this logic so far to the death penalty specifically.

Connecticut

In *State v. Santiago*, the Supreme Court of Connecticut not only invalidated a specific death sentence as unconstitutionally cruel and unusual because it violated the due process provision of the state constitution,[82] but also applied the prospective abolishment of the death penalty retroactively, thereby invalidating all death sentences in the state. The holding of the case states that because the legislature had prospectively outlawed the punishment, the death sentences imposed before the new legislation, but not yet carried out, were no longer in accordance with contemporary standards of decency and therefore must be invalidated.[83] The basis for the judgement that the death penalty is no longer in accordance with contemporary standards of decency is that the legislature had since made that punishment unavailable for the crime at issue (and in this case, any crime).[84] In the opinion, the case makes clear that they are being faithful to the legislative will.[85]

In this case, the Connecticut Supreme Court, while deciding the case under the state constitution and looking specifically to state history, was also *not* deviating from federal eighth

[82] Connecticut law has already established that due process at the state level incorporates a ban on cruel and unusual punishment. *State v. Santiago*, 122 A.3d 1, 16–17 (Conn. 2015).
[83] *State v. Santiago*, 122 A.3d 1 (Conn. 2015).
[84] *Id.* at 13.
[85] *Id.* at 15.

amendment precedent in determining what generally constitutes cruel and unusual.[86] In looking to objective indicia of evolving standards of decency, namely legislative acts, the Connecticut Supreme Court made retroactive a legislative penalty change, thereby making clear that current eighth amendment jurisprudence *is* amenable to making retroactive, prospective legislative abolitions of excessive punishment.

Connecticut courts, however, subsequently failed to extend the logic of *Santiago* to other prospective criminal legal reform laws.[87] Partly, the Connecticut Supreme Court relied on the idea that death is different, but even more emphasis was placed on the fact that the legislative prospective abolition of the death penalty was absolute, while the sentencing change at issue in *Griffin v. Warden, State Prison* was not.[88] It is much harder, if not impossible, to make a legislative act retroactive when it is not a clear rule; the particular defendant appealing might be the exception the legislature imagined. Making a not total rule retroactive is particularly hard to do when a court is trying to maintain its role as faithfully interpreting the legislative will. The logic of *Griffin* therefore does not prohibit extending the logic of *Santiago* beyond the death penalty.

New Mexico

The Supreme Court of New Mexico, compiling the two cases of *Fry v. Lopez* and *Allen v. LeMaster*, declared the death penalty comparatively disproportionate after the prospective abolition of the death penalty because it would be arbitrary to uphold these death sentences and no later ones.[89] The Supreme Court of New Mexico made the legislature's 2009 prospective

[86] The decision explicitly examines the history of the Connecticut constitution and how the due process clause has come to incorporate federal eighth amendment jurisprudence. *Id.* at 18, 20–23, 39–40, 45–46.
[87] *See Griffin v. Warden, State Prison*, 65 Conn. L. Rptr. 185 (Conn. Super. Ct. 2017).
[88] *Id.*
[89] *Fry v. Lopez*, 447 P.3d 1086, 1095–96 (N.M. 2019).

abolition of the death penalty retroactive; not doing so, the court said, would be delinquent of their own capital sentencing statute, which demands proportionality.[90] That capital sentencing statute was passed in response to Supreme Court eighth amendment jurisprudence.[91] In its decision, the court particularly stresses its duty to rely on the policy judgements of the legislature, rather than their own.[92] The court strives to uphold the new legislative action, citing the legislature as the surest sign of contemporary standards of decency.[93] Here too, the Supreme Court of New Mexico relies on settled United States Supreme Court eighth amendment jurisprudence to make a prospective legislative abolishment retroactive.[94]

Oregon

In *State v. Bartol*, the Oregon Supreme Court likewise relied on the changing standards of decency signaled in legislature curtailment of the death penalty to invalidate a death sentence under the proportionality provision of the state constitution.[95] In 2019, the state legislature significantly narrowed the class of cases in which a death sentence would be allowed.[96] The legislature did not make this change retroactive, but the court did. The court recognized that the legislative act showed a change in the standards of decency, and so to be free of cruel and unusual punishment, and to be properly proportionate under the Oregon state constitution, the court had to make the act retroactive.[97] In its decision, the court stresses the arbitrariness of such

[90] *Id.*
[91] *Id.* at 1095–96.
[92] *Id.* at 1093.
[93] *Id.* at 1097
[94] *Id.* at 1093–94.
[95] *State v. Bartol*, 496 P.3d 1013 (Or. 2021).
[96] *Id.*
[97] Carol S. Steiker & Jordan M. Steiker, *Little* Furmans *Everywhere: State Court Intervention and the Decline of the American Death Penalty*, 107 CORNELL L. REV. 1621, 1650 (2022).

laws not being retroactive: the exact same crime committed one day before the enactment date and one day after would not be eligible for the same punishment.[98]

Extending Eighth Amendment Jurisprudence in the State Context

In each of these three cases, the state supreme court made retroactive a legislature's prospective abolishment of the most serious punishment: death. In each of these opinions, the court applies standard eighth amendment jurisprudence. But at the heart of each of these cases is something even more simple: deference to the legislature as arbiters of decency. The court is simply carrying out the legislature's will even when it is not politically feasible for the legislature to do itself.[99] These decisions, not stretching the bounds of eighth amendment proportionality jurisprudence, but accomplishing retroactivity, show that making retroactive legislative sentence reform is compatible with eighth amendment jurisprudence.

Incarcerated people and their advocates already use prospective sentencing reform as persuasive authority at resentencing hearings and in parole applications and clemency petitions.[100] Lawyers in courtrooms and in their briefs can be heard saying things like: "if he had been sentenced today, our client would not have been able to receive this sentence. His current sentence is three times what the current maximum sentence for this crime is."[101] These arguments are particularly available and convincing in drug convictions because that is an area of

[98] *State v. Bartol*, 496 P.3d 1013, 10128 (Or. 2021).
[99] It is very difficult for legislatures to make retroactive sentencing reform changes. There is simply not the political will to better conditions for people already convicted of crimes, people who cannot vote or exert any pressure on the political branches. The political compromise of prospective reform does not discredit the evolved standard of decency present in the prospective reform, it just highlights the difficulty of application and enforcement. This is particularly true regarding the most serious and notorious crimes. *See* Carol S. Steiker & Jordan M. Steiker, *Little* Furmans *Everywhere: State Court Intervention and the Decline of the American Death Penalty*, 107 CORNELL L. REV. 1621, 1640–47 (2022).
[100] This practice of intuitive sense has sometimes even been acknowledged and required by the state. *See, e.g.*, *Wells-Yates v. People*, 454 P.3d 191 (Co. 2019).
[101] These example quotes are based on my experience working on resentencing cases in Georgia and Colorado. During my summer internship in the summer of 2022, Spero Justice Center included in multiple cases the argument that present sentencing guidelines would not allow such severe punishments as were currently being imposed.

great sentencing reform.[102] These arguments, however, also apply in other areas of criminal law.[103] In calls for individual resentencing, advocates lean on the fact that their clients could not be sentenced as harshly under current law.

The underlying assumption in this argument and in the state court decisions cited above is that our society is punishing people every day we incarcerate them, every moment that we take their freedom, or in some cases their life, and not just in the instant that a judge hands down a sentence. If every day someone is incarcerated is part of the punishment levied against them, we as a society must be able to justify that punishment every day of their sentence, and not just the first. The Oregon Supreme Court was moved by this thinking. In *Bartol*, the court approvingly quoted an Oregon Capital Resource Center memo stating that "no state has executed someone for a crime that was not subject to the death penalty on the day of the execution" as a convincing reason to make the law retroactive.[104] The Oregon Supreme Court thought that the state should have to justify the punishment every day, including the last.

This idea gives greater weight to the problem of arbitrariness over time. How is it fair that someone before the enactment of a reform law is treated categorically differently than someone who commits the exact same act a day later?[105] If we care about the whole sentence, if

[102] *See, e.g.*, First Step Act of 2018, Pub. L. No. 115–391.
[103] In Colorado, for example, there have been recent changes lessening the maximum sentence for both felony murder and habitual offenses.
[104] *State v. Bartol*, 496 P.3d 1013, 1019 (Or. 2021) (quoting Oregon Capital Resource Center brief).
[105] Many have articulated this unfairness. *See, e.g.*, Jeremy Haile, *Farewell, Fair Cruelty: An Argument for Retroactive Relief in Federal Sentencing*, 47 U. TOL. L. REV. 635, 640 (2016) ("Retroactivity is, first and foremost, a matter of fairness. Two individuals who commit the exact same offense should not receive different punishments merely because they are sentenced on different dates. It should be the conduct and characteristics of the individual sentenced, not the date of the sentencing, that weigh most heavily in determining the severity of punishment"); International Covenant on Civil and Political Rights, art. 15, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx ("If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."). Although the U.S. ratified the ICCPR on June 8, 1992, it did so with reservations, including on retroactivity: "That because U.S. law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of article 15." Declarations & Reservations on the International

we feel the need to justify every day we keep someone incarcerated, if we feel the need to believe that death is appropriate on the day we execute someone and not only the day we decide we want to, then it is not fair.

How can we address this problem: retroactivity. Retroactivity does not help everyone. Retroactivity does not help someone who has already been executed, or those who have finished their sentence, but retroactivity does ensure that every day we punish someone it is in accordance with what, at that moment, the legislature believes is appropriate and moral and for the good of society.

What does retroactivity mean? Any sentence that would not be allowed under a current sentencing scheme is unconstitutional under the eighth amendment state corollary. Anyone serving such an unlawful sentence could challenge their sentence under the eighth amendment state corollary and be resentenced to the new maximum punishment allowed. To proactively preclude cruel and unusual punishment, to make the effects of retroactivity more administrable, and to bypass the difficulties of post-conviction review, courts mandating retroactivity could demand an automatic resentencing of anyone whose punishment is beyond the new maximum whenever a sentencing reform statute passes.

IV. Counterarguments and Responses

IV: Conclusion

Scholars have called the population of incarcerated people who entered the criminal legal system as youth during the initial surge of mass incarceration, toward the end of the twentieth

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Covenant on Civil and Political Rights, ch. IV.4, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf.

century, the most incarcerated generation.[106] Reparations for their arbitrary ensnarement in the criminal legal system, due in large part to the timing of their birth and entry into young adulthood coinciding with the policy changes that grew mass incarceration, must stem first from making sentencing reform retroactive. For those who are growing old inside prisons, and for our entire community as we strive to combat the monster of mass incarceration we created, we must start to effect change.

Sentencing reform is important. Decarceration will bolster communities, protect government budgets, and most importantly allow liberty for individuals who have languished behind prison bars for years or even decades. Decarceration is not only important policy, but also sound constitutional law.[107]

There are multistep tests for eighth amendment proportionality, but the fundamental principle is stopping indecent punishment, as it is defined by the legislature, the people's will. A protection against cruel or unusual punishment is largely meaningless if it does not even enforce the current morals of the legislature. State courts can and must start to play a more meaningful role in protecting people who are incarcerated from the cruelty of long-ago written and since overridden laws.

[106] Rachael Bedard, Joshua Vaughn, & Angela Silletti Murolo, *Elderly, Detained, and Justice-Involved: The Most Incarcerated Generation*, 25 CITY UNIV. OF N.Y. L. REV. 162 (2022), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1538&context=clr.

[107] As this paper explains, decarceration through retroactivity is sound constitutional law, even if it is not sound Constitutional law. Evolving standards of decency analysis applies differently in the state than federal context.

Applicant Details

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Applicant Education

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Date of BA/BS	**May 2018**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law and Social Problems**
Moot Court Experience	**Yes**
Moot Court Name(s)	**1L General - Copyright**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Metzger, Gillian
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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

EVELYN MCCORKLE
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June 21, 2023
The Honorable Morgan Christen
United States Court of Appeals
Ninth Circuit
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

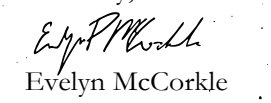
I am a rising third-year student, Harlan Fiske Stone Scholar, and Executive Board member of the *Journal of Law and Social Problems* at Columbia Law School. I write to apply for a clerkship in your chambers for the 2025-26 term. I am particularly interested in clerking for you because of your time as a state court judge on the Alaska Superior Court and the invaluable experience you bring to the bench as a longtime litigator. I hope to pursue a career in public integrity prosecution, which is active at both the state and federal level, and so I would be thrilled to work with a judge with your depth and diversity of experience.

I am also eager to contribute my diversity of experiences, strong research and writing skills, and intellectual curiosity to your chambers. I possess both criminal and civil experience and have pursued public sector work passionately. Prior to law school, I spent three years with the New York City Department of Investigation, where I developed an understanding of law enforcement operations and how federal criminal cases are built. I then interned with the E.D.N.Y. U.S. Attorney's Office, where I developed my legal research and writing skills by drafting memoranda and motions in limine. This summer, I will be interning at DOJ Main Justice, further developing my exposure to federal criminal law. On the civil side, I served as an intern in the spring for Judge Failla and while I participated in a diversity of matters, my written work was civil in nature. I crafted a response to a motion to compel arbitration, a ruling on a motion to remand, and a memorandum on personal jurisdiction. Now, my internship with Allen & Overy is exposing me to the complexities of civil commercial litigation.

As I develop my own skill set and style as a litigator, I want to clerk for a judge with your experience as an advocate. Moreover, having interned in a district court, I am now eager to clerk at the appellate level—to delve deeper into the law, and learn about trial work using a retrospective analysis. Thank you for your consideration, and please do not hesitate to contact me if you need further information.

Enclosed please find my resume, transcript, and writing sample, which more fully detail my skills and experience. Following separately are letters of recommendation from Columbia Law School Professors Gillian Metzger (gem3@columbia.edu, 646-530-0640) and Richard Briffault (rbl4@columbia.edu, 212-854-2638), as well as Deputy U.S. Attorney for the Southern District of New York Margaret Garnett (margaretgarnett1@gmail.com).

Sincerely,



Evelyn McCorkle

EVELYN MCCORKLE

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EDUCATION

Columbia Law School, New York, NY
J.D. expected May 2024
Honors: Harlan Fiske Stone Scholar
Activities: *Journal of Law and Social Problems*, Executive Finance Editor (duties include engaging in all final reads with EIC and EE, running *JLSP* special projects, and reporting annual financials to the Board)
OutLaws, Judiciary Chair
Columbia Law Women's Association, Treasurer

Barnard College, Columbia University, New York, NY
B.A. received in Political Science May 2018
Minor: Economics
Honors: Dean's List (5/8 semesters)
Activities: Student Government Associate, VP of Finance
Research Assistant to Barnard College President Debora Spar
Bard Globalization and International Affairs Program

EXPERIENCE

Department of Justice Public Integrity Section, Washington, D.C.
Incoming Summer Intern Starting July 2023

Allen & Overy, New York, NY
Summer Associate May 2023 – July 2023
Researching and writing for: a CJA RICO conspiracy defense, a pro bono asylum matter, and a white collar/securities regulation cryptocurrency defense.

Office of the Hon. Judge Katherine Polk Failla, New York, NY
Spring Extern January 2023 – April 2023
Performed legal research and writing (produced a written opinion as to a motion to compel arbitration, an oral decision as to a motion to remand or in the alternative vacate without prejudice, and a memorandum on personal jurisdiction). Participated in proceedings (criminal and civil) taking notes for clerks.

United States Attorney's Office for the Eastern District of New York, Brooklyn, NY
Summer Legal Intern May 2022 – August 2022
Conducted legal research and drafted memoranda regarding findings for cases from the Public Integrity and General Crimes sections. Drafted motions in limine for use in ongoing cases. Participated in internal meetings, proffers, witness preparation sessions, status conferences, and trials.

NYC Department of Investigation, New York, NY
Confidential Investigator June 2018 – September 2021
Investigated cases of corruption, fraud, and other illegal activities committed by elected officials and other city employees, agencies, and nonprofit organizations receiving city funding. Produced policy recommendations and public reports on findings or referred cases for prosecution. Wrote three annual Anticorruption Reports for DOI Squad 5, covering corruption vulnerabilities and mitigation efforts undertaken by the agencies under Squad 5 oversight. Conducted surveillance, forensic accounting, wires, interviews, and arrests.

New Sanctuary Coalition, New York, NY
Pro Se Clinic Volunteer October 2019 – June 2021
Aided asylum seekers by completing I-589s, drafting affidavits, and working with assigned attorneys.

SKILLS AND INTERESTS

French (proficient) • NY State Rape Crisis Counselor • Car Camping • Crossfit • Dungeons & Dragons

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CLS TRANSCRIPT (Unofficial)

05/23/2023 21:14:56

Program: Juris Doctor

Evelyn P McCorkle

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A-
L6661-1	Ex. Federal Court Clerk - SDNY	Radvany, Paul	1.0	CR
L6661-2	Ex. Federal Court Clerk - SDNY - Fieldwork	Radvany, Paul	3.0	CR
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	A-
L9137-1	S. Sentencing	Richman, Daniel; Sullivan, Richard	2.0	A

Total Registered Points: 12.0

Total Earned Points: 12.0

January 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L8899-1	S. Practicing International Law: Maritime Conflicts and Law of the Sea	Harris, Robert; Waxman, Matthew C.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-2	Evidence	Capra, Daniel	4.0	B+
L6425-1	Federal Courts	Metzger, Gillian	4.0	B
L6269-1	International Law	Damrosch, Lori Fisler	3.0	A
L6675-1	Major Writing Credit	Metzger, Gillian	0.0	CR
L8812-1	S. Public Integrity and Public Corruption [Minor Writing Credit - Earned]	Briffault, Richard	2.0	A
L6683-1	Supervised Research Paper	Metzger, Gillian	1.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B+
L6679-1	Foundation Year Moot Court		0.0	CR
L6121-12	Legal Practice Workshop II	McCamphill, Amy L.	1.0	P
L6169-1	Legislation and Regulation	Metzger, Gillian	4.0	A
L6116-4	Property	Merrill, Thomas W.	4.0	B
L6118-2	Torts	Rapaczynski, Andrzej	4.0	B

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-6	Legal Methods II: International Problem Solving	Hakimi, Monica	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	B
L6133-2	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	B
L6105-4	Contracts	Emens, Elizabeth F.	4.0	B+
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-12	Legal Practice Workshop I	McCamphill, Amy L.; Yoon, Nam Jin	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 59.0

Total Earned JD Program Points: 59.0

Issue Date: 06/17/2020

BARNARD COLLEGE TRANSCRIPT

NAME McCorkle, Evelyn P. ENTERED FALL 2015 TRANSFER DEGREE BACHELOR OF ARTS, May 16, 2018
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BARNARD ID 1728157 MAJOR Political Science - Sr Req:Pass
BIRTH DATE 02/24/1996 MINOR Economics
ISSUE DATE 06/17/2020

TRANSFER CREDIT

UNIV OF WASHINGTON 14-15	30.0	

ADVANCED PLACEMENT CREDIT

ENGLISH LIT/COMP	3.0	
FRENCH	6.0	
U. S. HISTORY	3.0	

FALL 2015

AFRS BC3528	HIST CULT POLIT ECON HARLEM	4.0	A
ECON BC2075	LOGIC LIMITS ECONOMIC JUSTICE	3.0	B+
ECON BC2411	STATISTICS FOR ECONOMICS	4.0	B
POLS V1013	POLITICAL THEORY I	4.0	B+
		15.0	3.41

SPRING 2016

ECON BC1007	MATH METHODS FOR ECONOMICS	4.0	A-
ECON BC3033	INTERMEDTE MACROECONOMC THEORY	4.0	B-
ECON BC3041	THEORETICL FOUNDTNS-POLIT ECON	3.0	A-
POLS V1601	INTERNATIONAL POLITICS	3.0	A-
PHED BC1589	WOMEN'S STRENGTH	1.0	P*
		15.0	3.41

FALL 2016

CPLT BC3110	INTRO TO TRANSLATION STUDIES	3.0	A
ECON BC3035	INTERMEDTE MICROECONOMC THEORY	4.0	B+
EESC BC1001	ENVIRONMENTAL SCIENCE I	4.5	A+
POLS BC3500	COLL:POLIT ECON:CORRPTN/CONTRL	4.0	A-
		15.5	3.83

On Dean's List for Fall 2016

SPRING 2017

EESC BC1002	ENVIRONMENTAL SCIENCE II	4.5	A+
POLS BC3254	FIRST AMENDMENT VALUES	3.0	A
POLS BC3543	COLL:NON-STATE GOV CRIME/WAR	4.0	A-
VIAR UN1000	BASIC DRAWING	3.0	A+
		14.5	4.07

On Dean's List for Spring 2017

FALL 2017

ECON BC3018	ECONOMETRICS	4.0	P
ECON BC3024	MIGRATION & ECONOMIC CHANGE	3.0	B+
ECON BC3063	SR SEM:STEREOTYPES,CRIME,JSTC	4.0	A
POLS UN1201	INTRO TO AMERICAN POLITICS	4.0	A
		15.0	3.81

SPRING 2018

ECON GU4228	URBAN ECONOMICS	3.0	B
ECON UN3025	FINANCIAL ECONOMICS	3.0	UW
POLS BC3055	COLL:POL VIOLENCE & TERRORISM	4.0	A-
POLS GU4845	NAT SECURITY STRAT OF MID EAST	4.0	A
		11.0	3.62

On Dean's List for Spring 2018

BARNARD POINTS COMPLETED [GPA]	86.0	3.69
TRANSFER POINTS	30.0	
SUMMER POINTS	0.0	
OTHER POINTS	12.0	
CUMULATIVE POINTS COMPLETED	128.0	

Jennifer Simmons
Barnard College Registrar

June 21, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I'm writing to recommend Evelyn McCorkle, a rising Columbia Law School 3L, for a clerkship in your chambers. Evelyn is an extremely smart and thoughtful law student with a deep commitment to public service. Teaching her has been a pleasure, and I'm sure she would be a wonderful and valued addition to chambers.

I have taught Evelyn in two classes at Columbia: Legislation and Regulation and Federal Courts. Evelyn got an A- in LegReg and was a very strong and important contributor to the class. Her comments were always nuanced and original, drawing insights from the three years she spent working in a local administrative office before law school. She is also very adept at doctrinal analysis. I would keep an eye out to make sure to call on her whenever she volunteered because I found her comments so valuable—and cold-calling her repeatedly seemed unfair!

I also enjoyed having Evelyn in Federal Courts. It was a much larger class with fewer volunteer opportunities, and I know for personal reasons it was a challenging time for her. Even so, Evelyn made great contributions when I called on her, and her comments in class and in office hours demonstrated a strong grasp of the material. I do not believe that the B grade she got in the class is an accurate reflection of her ability or understanding of Federal Courts. Indeed, what strikes me when I look at Evelyn's transcript is the strong trajectory upward. Like many students who took a few years off, it took her a little while to adjust to law school, but her grades 2L year are more in keeping with her impressive abilities.

I also supervised Evelyn's note, which is a well-written, comprehensive, and carefully argued assessment of judicial recusal reform. I was particularly impressed by Evelyn's initiative and ability to work independently. She had identified the topic and undertaken substantial research before we had our first substantive meeting—a very rare occurrence in my experience! Evelyn was never defensive but instead responded to criticism by rethinking her analysis and deepening her arguments in the process.

Finally, Evelyn is notably mature and has a warm and engaging manner. I really enjoyed our conversations about her note; Evelyn's excitement about her topic was always evident and contagious. She has a deep commitment to working on public corruption issues, and her enthusiasm for public service is a joy to see. I am confident you would enjoy working closely with her.

Please do not hesitate to contact me if there is any further information on Evelyn that I can provide.

Very truly yours,

Gillian E. Metzger

Gillian Metzger - gmetzg1@law.columbia.edu

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 21, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Re: Evelyn P. McCorkle

Dear Judge Christen:

I am writing in support of Evelyn P. McCorkle of the Columbia Law School Class of 2023, who is applying to you for a clerkship. Evelyn has excellent research and writing skills, an enthusiasm for learning and the law, and a demonstrated commitment to public service. She will make an excellent law clerk.

I taught Evelyn in two courses – Legal Methods in the Fall 2021 term and the Seminar on Public Integrity and Public Corruption in the Fall 2022 term. Legal Methods is Columbia's intensive "introduction-to-law" course, given at the start of the 1L year, to initiate students into the case method, statutory interpretation, and legal reasoning. Evelyn got off to a strong start in Le-gal Methods, demonstrating understanding of the material and eager engagement with legal analysis. As the course is taught on a pass-fail basis, I did not have occasion to closely evaluate her work.

Evelyn was an outstanding participant in my Seminar, which combines material on the white-collar crime aspects of corruption, with campaign finance law, lobbying regulation and government ethics. She was a frequent and insightful participant in class discussions, often taking the lead in analyzing the cases and statutes and linking them to current problems. She wrote four excellent reaction papers that displayed a close reading of the assignment and thoughtful assessment of the reasoning or arguments in the material. Over the course of the semester, she was in-creasingly attentive to the complexities of the subject – the risks of overcriminalization, the potential benefits of what is often pejoratively referred to as the "revolving door," and the difficulties of effectively regulating campaign finance and lobbying. Evelyn wrote an outstanding re-search paper on municipal offices of inspectors general, in which she compared the offices in New York City and Atlanta with respect to the motives for their creation, the type of oversight in which the office engages, the nature of its powers, its investigative authority, and its insulation from political control. The paper was thoroughly researched and very well written. Together the strength of the paper and quality of Evelyn's classroom work and reaction papers made it easy to give her an A for the Seminar.

Evelyn has a strong background in, and commitment to, public integrity work. Before coming to law school, she worked for three years as a confidential investigator at the New York City Department of Investigations. During her 1L year, she came to see me to discuss both law school and career opportunities in public integrity work. In addition to her Seminar classroom work, we have had extensive office discussions of the importance and challenges of that work.

Evelyn has excellent research and writing skills and legal experience, and she is deeply committed to public service. In her 1L summer, she worked as an intern in the United States Attorney's Office for the Eastern District of New York, where she conducted legal research and drafted memoranda regarding findings for cases from the Public Integrity and General Crimes sections. This past spring she was an extern in the Office of the Hon. Katherine Polk Failla, and this summer she will be an intern in the Public Integrity Section of the Department of Justice in Washington, D.C.

Beyond her specific experiences, strengths, and commitments, Evelyn brings an almost joyful curiosity to her work. She delights in learning and discussing law. She has an unusual zest to doctrinal analysis and legal research. I am sure you will find her a pleasure to have in your chambers.

Based on her strong research and writing skills, her demonstrated commitment to public service, and her enthusiasm for legal work, I am happy to recommend Evelyn P. McCorkle to you for a clerkship.

All the best,

Richard Briffault
Joseph P. Chamberlain Professor of Legislation

Richard Briffault - richard.briffault@law.columbia.edu - 212-854-2638

June 21, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I am delighted to provide you with this letter of recommendation for Evelyn McCorkle, who I understand has applied for a clerkship with your chambers. I first came to know Evelyn when I was the Commissioner of the New York City Department of Investigation, where she worked as an Investigator prior to law school. DOI is the inspector general for all of New York City government, and Evelyn was assigned to Squad 5, which covers the non-profit contracting sector as well as all City elected officials, including the Mayor and City Hall. As a consequence, Evelyn worked on many highly sensitive and complex matters, always distinguishing herself with her work ethic, attention to detail, and determination to follow the facts wherever they led.

I worked directly and closely with Evelyn when she was one of the investigators assigned to a series of allegations related to the possible misuse of his NYPD security detail by the Mayor and his family. Because of the high-profile and sensitive nature of the investigation, I was personally involved in both the investigation and the writing and editing of the report that we ultimately issued in the fall of 2021. Thus, I had much more exposure to Evelyn and to her work than would typically be the case for a Commissioner and an entry-level investigator in the agency. Although Evelyn was barely a year out of college when the investigation began, she quickly became a key member of the team, with great investigative instincts, maturity beyond her years in handling difficult and contentious interviews, and tremendous dedication to advancing the investigation despite the challenges presented by the COVID-19 pandemic. I personally attended the investigative interviews of the Mayor and First Lady, given the sensitivities involved, and I watched with pride as Evelyn, together with her investigative partner, led these interviews with confidence, poise, professionalism, and outstanding judgment. Although Evelyn was about to leave DOI to begin law school at Columbia, she also contributed significantly to the drafting and editing of the public report outlining our findings. Such was Evelyn's dedication to this project and to her colleagues on the investigative team, that even after starting law school she continued to work on an hourly basis in order to ensure that she could contribute to the final report, issued in early October 2021.

In November 2021, I left DOI to return to the United States Attorney's Office for the Southern District of New York, to become the Deputy U.S. Attorney. I had previously served as an AUSA in that Office from 2005 to 2017, including as the Chief of the Violent & Organized Crime Unit, and the Chief of Appeals. I have stayed in close contact with Evelyn, as a mentor, since she left DOI for law school, and have seen her continue to grow professionally and seek out every opportunity to achieve her goals as a lawyer.

I am confident that Evelyn would be an asset to any District Court chambers — she is bright, hardworking, organized, and able to juggle multiple competing priorities effectively. She is insightful about people and their motivations and has great professional judgment. On an interpersonal level, she is a delight — funny, kind, optimistic, a selfless teammate — particularly important in the small and close-knit environment of chambers. Despite the significant gap in our positions at DOI, Evelyn had a wonderful manner with me — deftly navigating being appropriately deferential while also participating fully and thoughtfully in the robust debate that I insisted on from the team in such a sensitive and important investigation. I think many of these dynamics mirror what I imagine you might seek from your law clerks, and I firmly believe Evelyn will be up to the task. Finally, I know that Evelyn has a tremendous heart for public service, and that she is looking to her clerkship as the next step to prepare her for such a career. I know that she will bring the same integrity, commitment, and public-minded spirit to her work as a law clerk that she did to her work at DOI and to her internships in the EDNY U.S. Attorney's Office, at the Public Integrity Section of DOJ, and with Judge Failla.

Although I can't speak directly to Evelyn's legal analysis and legal writing (and I understand Dean Metzger's letter will address those), in all other respects I give Evelyn my strongest recommendation. Please don't hesitate to contact me if I can answer any questions or be of further assistance to you in the law clerk selection process. You can reach me by email at Margaret.garnett@usdoj.gov, or by phone at 212-637-1591 or 646-483-4406.

Margaret Garnett - margaretgarnett1@gmail.com

EVELYN MCCORKLE
521 West 111th Street, Apt 25A, New York, NY 10025 • (774) 392-4100 • epm2139@columbia.edu

WRITING SAMPLE

This writing sample is a bench memorandum that I prepared while interning for Judge Katherine Polk Failla of the Southern District of New York. I received permission from the Judge to redact and rework the memo so that it could be used as a writing sample. For brevity I removed all but the discussion section, and for privacy I redacted all identifying information from the body of the memo itself. This has been edited only by me.

Summary of the Facts:

Plaintiff is an American board game company that entered into an agreement with Defendant Y, a British board game company. The agreement in question, termed the "License Agreement," included a forum selection clause, and limited how and when the License Agreement could be terminated. A number of years after the initial License Agreement was signed, another British board game company—Defendant Z—bought Defendant Y. Ultimately, Defendant Z then instructed Plaintiff that it was terminating the License Agreement. As a result, Plaintiff brought this suit against both Defendant Y and Defendant Z in the Southern District of New York, pursuant to the forum selection clause in the License Agreement. Defendant Z moves the Court to dismiss for lack of personal jurisdiction, and for failure to state a claim.

DISCUSSION

Defendant Z moves the Court to dismiss for lack of personal jurisdiction, and for failure to state a claim. The Court should address the issues in the following order: (i) personal jurisdiction over Defendant Z, and (ii) failure to state a claim. Personal jurisdiction is a threshold issue—the case must be dismissed if the plaintiff fails to meet its burden of demonstrating that jurisdiction exists. As discussed below, the Court should deny both of Defendant's motions, finding that Plaintiff has sufficiently alleged jurisdiction under the successor-in-interest and "closely related" doctrines, and that Plaintiff has adequately alleged facts to state its claims.

A. Personal Jurisdiction

Defendant Z moves the Court pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure to dismiss it for lack of personal jurisdiction. Defendant Z further alleges that regardless, personal jurisdiction should be foreclosed by the due process guarantees of the Constitution, because—it alleges—it has not had the "minimum contacts" with New York necessary to be subject to jurisdiction here. *Id.* at 2.

The parties do not dispute that by its terms Defendant Z is not a signatory to the License Agreement between Plaintiff and Defendant Y. Rather, Plaintiff argues that personal jurisdiction nevertheless exists pursuant to either a theory of successor assumption of liability, or the "closely related" doctrine. (Pl. Opp. at 6-7). Defendant Z contends that its "parent-subsidiary" relationship with Defendant Y is insufficient to enforce the License Agreement's forum selection clause against it under the "closely related" doctrine. (Def. Br. at 1-2).

The Court should recognize that the law in this area is actively developing, but find that Plaintiff has alleged sufficient facts to support that Defendant Z has more than just a "parent-subsidiary" relationship with Defendant Y under either doctrine. Defendant Z has assumed Defendant Y's liabilities under New York law such that it can be bound by the License Agreement's forum selection clause and is subject to personal jurisdiction in New York. As such the Court should deny Defendant Z's motion to dismiss.

1. Applicable Law

"On a Rule 12(b)(2) motion, plaintiff carries the burden of demonstrating that jurisdiction exists, and where the district court did not conduct a full-blown evidentiary hearing on a motion, the plaintiff need make only a *prima facie* showing of jurisdiction." *Penachio* v. *Benedict*, 461 F. App'x 4, 5 (2d Cir. 2012) (summary order) (internal quotation marks and citations omitted). In deciding a Rule 12(b)(2) motion, the Court "construe[s] the pleadings and affidavits in the light most favorable to [the plaintiff], resolving all doubts in [its] favor." *DiStefano* v. *Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001). However, the Court cannot "draw argumentative inferences in the plaintiff's favor" and need not "accept as true a legal conclusion couched as a factual allegation." *O'Neill* v. *Asat Trust Reg.*, 714 F.3d 659, 673 (2d Cir. 2013).

If the Court lacks personal jurisdiction over a defendant, the claims against that defendant must be dismissed. However, in deciding a pretrial motion to dismiss for lack of personal jurisdiction "a district court has considerable procedural leeway." *Marine Midland Bank, N.A.* v. *Miller*, 664 F.2d 899, 904 (2d Cir. 1981) (citations omitted). The Court may "determine the motion on the basis of

affidavits alone or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion." *Id.* Still, the "[p]laintiff ultimately bears the burden of establishing personal jurisdiction by a preponderance of the evidence, either at an evidentiary hearing or at trial." *Metro-Goldwyn-Mayer Studios Inc.* v. *Canal+ Distribution S.A.S.*, No. 07 Civ. 2918 (DAB), 2010 WL 537583, at *5 (S.D.N.Y. Feb. 9, 2010).

"As a general rule," New York contract law does not hold an entity "purchasing the assets of another … liable for the debts and liabilities of the seller." *Miller* v. *Mercuria Energy Trading, Inc.*, 291 F. Supp. 3d 509, 525 (S.D.N.Y. 2018), *aff'd* 774 Fed. App'x 714 (2d Cir. 2019). However, the general rule does not apply in four scenarios: where "[i] a buyer who formally assumes a seller's debts; [ii] transactions undertaken to defraud creditors; [iii] a buyer who de facto merged with a seller; and [iv] a buyer that is a mere continuation of a seller." *Aguas Lenders Recovery Grp.* v. *Suez, S.A.*, 585 F.3d 696, 702 (2d Cir. 2009). Each scenario communicates a sufficiently close relationship between buyer and seller to bind the buyer to the seller's obligations. The third scenario, "buyer who de facto merges with a seller," can be satisfied by a successor-in-interest analysis. "Thus, for example, 'when a successor firm acquires substantially all of the predecessor's assets and carries on substantially all of the predecessor's operations, the successor may be held to have assumed its predecessor's . . . liabilities, notwithstanding the traditional rule.'" *Aguas Lenders Recovery Grp.*, (2d Cir. 2009) (ellipses in original) (quoting *Nettis* v. *Levitt*, 241 F.3d 186, 193 (2d Cir. 2001), overruled on other grounds by *Slayton* v. *Am. Express Co.*, 460 F.3d 215 (2d Cir. 2006)). The Second Circuit has further held that successors to contracts under the de facto merger doctrine should be prevented "from using evasive, formalistic means lacking economic substance to escape contractual obligations." *Nitro Elec. Co., Inc.* v. *ALTIVIA Petrochemicals, LLC*, No. 3:17 Civ. 2412 (RCC), 2017 WL 6567813, at *4 (S.D.W. Va. Dec. 22, 2017). There appears to be a degree of overlap between the successor-in-interest/de facto merger doctrine and the "closely related" doctrine that also stems from *Aguas*, in that courts have found that successors-in-interest can in some circumstances satisfy the "closely related" test. *See Vuzix Corp.* v. *Pearson*, No. 19 Civ. 689 (NRB) 2019 WL 5865342, at *5 (S.D.N.Y. November 6, 2019) quoting *Affiliated FM Ins. Co.* v. *Kuehne + Nagel, Inc.*, 328 F. Supp. 3d 329, 336 (S.D.N.Y. 2018); *see also Miller v. Mercuria Energy Trading, Inc.* 291 F. Supp. .3d 509, 524-25 (S.D.N.Y. 2018) (collecting cases).

As evidenced by the availability of both the successor-in-interest doctrine discussed above, and the "closely related" doctrine to follow, the Second Circuit has "declined to adopt a standard governing precisely 'when a signatory may enforce a forum selection clause against a non-signatory.'" *Fasano* v. *Li*, 47 F.4th 91, 103 (2d Cir. 2022) (quoting *Magi XXI, Inc.* v. *Stato della Città del Vaticano*, 714 F.3d 714, 723 N.10 (2d Cir. 2013)). Under the "closely related" doctrine, non-signatories may be bound by forum selection clauses where, "under the circumstances, the non-signatories enjoyed a sufficiently close nexus to the dispute or to another signatory such that it was foreseeable that they would be bound." *Fasano*, 714 F.3d at 103. Under this doctrine, a signatory to a contract may invoke a forum selection clause against a non-signatory if the non-signatory is "closely related" to one of the signatories. *Metro-Goldwyn-Mayer Studios Inc.*, 2010 WL 537583, at * 5 (internal quotation marks and citations omitted). Non-signatories have been found "closely related" where their interests are "completely derivative of" and "directly related to, if not predicated upon" the signatories' interests or conduct. *Id.* Courts typically find parties to be "closely related" in two situations: "where the non-signatory had an active role in the transaction between the signatories or where the non-signatory had an active role in the company that was the signatory." *Affiliated FM Ins. Co.,* 328 F. Supp. 3d at 336 (internal quotation marks omitted). But, as discussed above, courts in this district have also found that "successors-in-interest . . . at least in some instances, satisf[y] the 'closely related' test." *Vuzix Corp.*, 2019 WL 5865342, at *5 quoting *Affiliated FM Ins. Co.,* 328 F. Supp. 3d at 336.

In recent years, a number of courts in the Southern District of New York have argued that while the *Aguas* doctrines are appropriate as to motions to dismiss based on grounds of improper venue and forum non conveniens, motions to dismiss for lack of personal jurisdiction are different. *See e.g., Arcadia Biosciences, Inc.* v. *Vilmorin & Cie*, 356 F. Supp. 3d. 379, 389 (S.D.N.Y. 2019). These courts assert that "the rules governing personal jurisdiction" are "driven by constitutional concerns over the court's power to exercise control over the parties." *Id.* at 389 (internal quotation marks and citations omitted). Under this argument, plaintiffs must make some showing that defendants have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Courts in these circumstances may not exercise personal jurisdiction unless "the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2L.Ed.2d 1283 (1958).

Some courts have found that these constitutional requirements "caution against a liberal application of forum selection clauses to non-signatory defendants." *Arcadia Biosciences, Inc.* 356 F. Supp. 3d at 389; *see also Mersen USA EP Corp.* v. *TDK Electronics Inc.*, 594 F. Supp. 3d 570 (S.D.N.Y. 2022). However, other courts—inside and outside this district—have found that the "closely related" doctrine can justify the exercise of personal jurisdiction over non-signatory defendants regardless of whether they had previous minimal contacts with the forum state. *See, e.g., Metro-Goldwyn-Mayer Studios Inc.*, 2010 WL 537583, at * 5; *Franklink Inc.* v. *BACE Servs., Inc.*, 50 F.4th 432, 437, 441-43 (5th Cir. 2022).

2. The Court Has Personal Jurisdiction Over Defendant Z.

Personal jurisdiction is a threshold issue; as such, the Court begins by determining whether Defendant Z has consented to personal jurisdiction, and whether the exercise of personal jurisdiction over Defendant Z comports with the constitutional requirements of due process. *See Basile* v. *Walt Disney Co.*, 717 F. Supp. 2d 381, 385 (S.D.N.Y. 2010) ("[V]enue and personal jurisdiction are threshold procedural issues to be decided before the substantive grounds in a motion to dismiss.").

The License Agreement signed by Plaintiff and Defendant Y contains the following forum selection clause:

> (1) This Agreement shall be construed in accordance with the law of the state of New York, United States, without respect to its choice of law principles . . . Any legal action or proceeding arising under this Agreement will be brought exclusively in the federal or state courts located in New York City, United States, and each party irrevocably consents to personal jurisdiction and venue therein and waives any claim of improper venue or inconvenient forum. In the event of a dispute arising out of or relating to this Agreement, the prevailing party shall be entitled to receive from the other party its reasonable attorneys' fees and costs.

(Pl. Opp. Ex. B at § 16). Given the inclusion of this forum selection clause in the License Agreement between Plaintiff and Defendant Y, a determination of personal jurisdiction depends on whether Defendant Z, a non-signatory to the License Agreement, can nonetheless be bound by it. If

Defendant Z is bound by the License Agreement it has consented to personal jurisdiction in this Court.

To make this determination, the Court should turn to the two doctrines under *Aguas* discussed above. The first, successor-in-interest/de facto merger liability, occurs "when a successor firm acquires substantially all of the predecessor's assets and carries on substantially all of the predecessor's operations, [such that] the successor may be held to have assumed its predecessor's . . . liabilities, notwithstanding the traditional rule." *Aguas Lenders Recovery Grp.*, 585 F.3d at 702 (2d Cir. 2009) (ellipses in original and internal citations omitted). The second line of cases concerns the "closely related" doctrine, but because the "closely related" test can be satisfied by a successor-in-interest finding, the Court should proceed first with that analysis. *Vuzix Corp.*, 2019 WL 5865342, at *5 quoting *Affiliated FM Ins. Co.,* 328 F. Supp. 3d at 336.

a. Defendant Z is a Successor-in-Interest to Defendant Y

"[W]hen a successor firm acquires substantially all of the predecessor's assets and carries on substantially all of the predecessor's operations, the successor may be held to have assumed its predecessor's . . . liabilities, notwithstanding the traditional rule [that an entity purchasing the assets of another is not liable for the debts and liabilities of the seller]." *Aguas Lenders Recovery Grp.*, 585 F.3d at 702 (2d Cir. 2009) (ellipses in original and omitting internal citations). Here, though the exact nature of the Defendant Z purchase of Defendant Y is unclear (Pl. Opp. at 4), Defendant Z acknowledges a parent-subsidiary relationship between the defendants (Def. Br. at 1). Though Defendant Y remains in existence at least on paper, Plaintiff alleges that after Defendant Z made its purchase of Defendant Y, it took over all communications with Plaintiff, and ultimately Defendant Z—not Defendant Y—notified Plaintiff that it was terminating the License Agreement. (Compl. § 42; Pl. Opp. at 2). Plaintiff further alleges that Defendant Y "effectively has zero ongoing operations," and that Defendant Z personnel conduct the marketing for Defendant Y products, and handle "all account, customer/sales and support inquiries about [Defendant Y] products" directed to Defendant Z email addresses, such that customers contacting Defendant Y getting replies from support@"Z"hqhelp.zendesk.com. (Pl. Opp. at 6-7).

Moreover, there appears to be no dispute between Plaintiff and Defendant Z that Defendant Z acquired substantially all of Defendant Y's assets. The "Notice of Termination of Brand/Product License Agreement," which was sent to Plaintiff on January 21, 2022, states in relevant part "As you know, all of the asserts and outstanding ownership shares of [Defendant Y] were sold to [Defendant Z] pursuant to that certain Share Purchase Agreement by and among Mr. Z and Mrs. Z, [Defendant Z], dated as of September 23, 2021." *Id.* While it is true, as Defendant Z argues, that "a forum selection clause may not be enforced against a non-signatory parent corporation solely by virtue of its status as a parent corporation," *Array Biopharma, Inc.* v. *AstraZeneca PLC*, No. 18-cv-235 (PKC) 2018 WL 3769971, at *1 (S.D.N.Y. Aug. 9, 2018), the Notice of Termination email merely serves to confirm Plaintiff's allegations to the effect that Defendant Z acquired substantially all of Defendant Y's assets, while the rest of Plaintiff's alleged facts support their assertion that there exists more than a parent-subsidiary relationship between the Defendants in this case. Plaintiff has compellingly alleged that Defendant Z has also taken over substantially all of Defendant Y's operations. (Pl. Opp. at 9) ("Defendant Y has no employees, no officers, no directors, and no independent financial resources other than those held by Defendant. If Defendant Z is not *de jure* Defendant Y at this point, it is certainly *de facto* Defendant Y.").

Moreover, Plaintiff convincingly argues that Defendant Z was aware of the existence of the forum selection clause and that it might be defensively invoked. (Compl. §§ 35; 37-39). While the precise corporate relationship between Defendant Z and Defendant Y is unclear at this stage of litigation, the facts alleged by Plaintiff suffice for the Court to conclude that Defendant Z is Defendant Y's successor-in-interest under New York law. *See Metro-Goldwyn-Mayer Studios Inc.* v. *Canal+Distribution S.A.S.*, No. 07-civ-2918 (DAB), at *5 (S.D.N.Y. Feb. 9, 2010) (finding that a successor-in-interest owning a majority of signatory's shares, despite an unclear corporate relationship, is sufficient basis to conclude the plaintiff may invoke the contractual forum selection clause against the non-signatory entities that are "closely related" and deny defendants' motion to dismiss for lack of personal jurisdiction).

Plaintiff has adequately alleged that Defendant Z acquired substantially all of Defendant Y's assets and has taken on substantially all of its operations, thus fitting squarely in the role of successor under the *Aguas* line which permits exception to the general rule and provides an argument that Defendant Z is bound by the License Agreement and has consented to personal jurisdiction in New York. *Aguas*, 585 F.3d at 702. Resolving all doubts in Plaintiff's favor, *see DiStefano*, 286 F.3d at 84, the facts support that Defendant Z de facto merged with and is the successor to Defendant Y such that it may be held to the License Agreement's forum selection clause. *Aguas,* 585 F.3d at 702.

b. As Its Successor-in-Interest, Defendant Z is "Closely Related" to Defendant Y

Plaintiff would no doubt argue that the Court's analysis could end here, because it has sufficiently pleaded that Defendant Z is a successor-in-interest to Defendant Y. But Defendant Z argues that more is needed for a party to be found "'closely related' to the dispute such that it becomes 'foreseeable' that it will be bound." (Def. Br. at 7) (quoting *Cuno, Inc.* v. *Hayward Indus. Prods., Inc.*, No. 03-civ-3076 (MBM), 2005 WL 1123877, at *6 (S.D.N.Y. May 10, 2005) (internal citations omitted). Defendant Z asserts that Plaintiff has failed to allege foreseeability under a *Fasano* framework—which finds foreseeability where "[i] . . . the non-signatory acquiesce[s] to the forum selection clause 'by voluntarily bringing suit with signatories'; [ii . . .] non-signatories provide . . . letters of credit to signatories and 'ha[ve] interests in the litigation that were directly related to, if not predicated upon those of the signatories'; and [iii] where non-signatories were . . . integrally related to signatories 'such that suit should be kept in a single forum.'" (Def. Br. at 7) (quoting *Fasano* at 103-04) (internal citations omitted).

Defendant Z also attempts to differentiate *Fasano* by emphasizing that the Second Circuit's decision there turned on the fact that "'it was repeatedly stated' that the non-signatory defendants would undertake the conduct underlying the complaint subject to the terms of conditions of 'the contract that contains the Forum Selection Clause' rendering 'reasonably foreseeable'" they would be bound. (Def. Br. at 7-9). Defendant Z argues that Plaintiff has failed to allege similar facts, and is unable to show that Defendant Z could have foreseen being the subject to the forum selection clause.

It *is* reasonable to differentiate *Fasano* from the case at hand; the License Agreement between Defendant Y and Defendant Z has not been provided to the Court, and so it is not clear whether Defendant Z was forewarned that it would be subject to the License Agreement with Plaintiff in the very explicit way the Second Circuit held that the defendant was in *Fasano*. If the License Agreement between Defendant Z and Defendant Y was that explicit, the Court has had no opportunity to confirm as much. In fact, Plaintiff makes complaints to this effect, noting that Defendant Z has refused to

produce documents in response to Plaintiff's discovery requests. (Pl. Opp. 2; 5). This does not, however, mean that the Court cannot find Defendant Z sufficiently "closely related" to Defendant Y for it to have been foreseeable that it could be bound as a non-signatory to the License Agreement. It is true that many courts have found parties "closely related" under *Aguas* for the reasons Defendant Z discusses, such as where defendants have had an active role in the initial transaction, or had a close relationship to the signatory at the time of the agreement. This does not refute the fact that still other courts have found parties "closely related" as "non-signatory alter egos, corporate executive officers, and successors-in-interest." *Affiliated FM Ins. Co.*, 328 F. Supp. 3d at 336; *see also Miller v. Mercuria Energy Trading, Inc.* 291 F. Supp. .3d 509, 524-25 (S.D.N.Y. 2018) (collecting cases).

Under a theory of successor-in-interest, and thus permissively under the "closely related" doctrine, Plaintiff has adequately alleged that Defendant Z should be bound to the License Agreement at issue and to the forum selection clause therein. This finding brings the Court to the final argument Defendant Z asserts with respect to its 12(b)(2) motion: that applying precedent from the *Aguas* line, including the "closely related" doctrine, is inappropriate in the personal jurisdiction context as it raises due process concerns. (Def. Br. at 10); *see also Mersen USA,* 2022 WL 902372, at *10; *Arcadia* 356 F.Supp.3d at 395.

c. The "Closely Related" Doctrine Does Not Require Defendant Z to Have Minimal Contacts With New York State

This Court is cognizant that its use of the "closely related" doctrine in the context of a motion to dismiss for lack of personal jurisdiction implicates the concerns of some courts regarding the constitutionality of imposing personal jurisdiction on a non-signatory with no minimal contacts in the forum state. *See Mersen USA,* 2022 WL 902372, at *10; *Arcadia* 356 F.Supp.3d at 395. The "closely related" doctrine has roots in *Aguas*, which, as the *Mersen USA* and *Arcadia* courts noted, was decided under the principle of forum non conveniens, not personal jurisdiction. *Fasano*, too, was decided under the "closely related" doctrine and in the context of forum non conveniens as opposed to personal jurisdiction. Select lower courts in other circuits have raised similar concerns that the doctrine is in tension with the Supreme Court's minimum contacts requirements. *Fitness Together Franchise, LLC* v. *EM Fitness, LLC,* No. 1:20-cv-02757-DDD-STV, 2020 WL 6119470, at *5 (D.Colo. Oct. 16, 2020).

However, as Defendant Z admits (Def. Br. at 8), in other cases, including a recent and well-reasoned decision in the Fifth Circuit, courts *have* found it appropriate to bind non-signatory defendants subject to contractual forum selection clauses under the "closely related" doctrine in the context of a motion to dismiss for lack of personal jurisdiction. *Franklink Inc.,* 50 F.4th at 441-43. The Fifth Circuit acknowledged in *Franklink Inc.* the percolating legal theory that due process concerns should deter application of the "closely related" doctrine in the personal jurisdiction context, and the fact that the "closely related" has admittedly "vague standards." *Id.* at 440. This Court should concur with the Fifth Circuit's findings that the Third and Seventh Circuits have provided more clarification and explanation of the theory than other circuits. *Id.* at 439. Ultimately, the Fifth Circuit found that the doctrine has been sufficiently scrutinized. *Id.* at 441. In explaining its decision not to apply a minimal contacts requirement, the Fifth Circuit noted that the "closely related" doctrine "has been recognized by all other circuits to have considered it" and as such it was loath to create a circuit split, particularly when the doctrine could "serve a purpose in producing equitable results." *Id.* While not bound by the Fifth Circuit, this Court should find its argument persuasive that "prudence and judicial modesty caution against singularly swimming against this tide of authority." *Id.* The Second Circuit

has not spoken on this issue specifically or particularly clearly—*Fasano* was decided in the context of forum non conveniens—and until the Second Circuit does speak, the *Aguas* line supports a tailored application of the "closely related" doctrine, even on a motion to dismiss for lack of personal jurisdiction.

B. Failure to State a Claim

Defendant Z also moves the Court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Plaintiff's claims against it for failure to state a claim. Defendant Z argues that Plaintiff's claims should be dismissed because Defendant is a non-signatory to the License Agreement that "is the foundation of [Plaintiff]'s case" (Def. Br. at 13). For the reasons outlined below, the Court should deny Defendant Z's motion to dismiss.

1. Applicable Law

To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (omitting internal citations). The Court should grant dismissal pursuant to Rule 12(b)(6) only where the complaint cannot state any set of facts that would entitle the plaintiff to relief." *Hertz Corp.* v. *City of N.Y.*, 1 F.3d 121, 125 (2d Cir. 1993). In determining the viability of Plaintiff's claims, the Court must accept as true all well-pleaded factual allegations in the complaint. *Id.* at 678. Additionally, the Court may consider not only the complaint itself, but also documents attached to the complaint as exhibits, any statements or documents incorporated by reference in the complaint, and documents that are "integral" to the complaint even if they are not incorporated by reference. *See Chambers* v. *Time Warner, Inc.,* 282 F.3d 147, 152-53 (2d Cir. 2002); *see generally Goel* v. *Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016) (discussing materials that may properly be considered in resolving a motion brought under Fed. R. Civ. P. 12(b)(6), explaining that "[a] document is integral to the complaint 'where the complaint relies heavily upon its terms and effect,'" which often involves "a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls"). However, "although a court must accept as true all of the allegations contained in a complaint, that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Harris* v. *Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (internal quotation marks, alterations, and citations omitted); *see also Rolon* v. *Henneman*, 517 F.3d 140, 149 (2d Cir. 2008) (explaining that a court need not accept "conclusory allegations or legal conclusions masquerading as factual conclusions").

2. Failure to State a Claim Discussion

Defendant Z asserts that "even if [it] were subject to jurisdiction in New York, [Plaintiff]'s claims against it should be dismissed because it is not a party to the agreement that is the foundation of [Plaintiff]'s case." (Def. Br. at 13). Plaintiff argues that Defendant Z "has assumed the role of Defendant Y in connection with the Agreement" and that Defendant Z, not Defendant Y, worked with Plaintiff after Defendant Z's acquisition of Defendant Y in September 2022. (Pl. Opp. at 9). Moreover, Plaintiff claims that Defendant Z, not Defendant Y, "purported to terminate the Agreement" which, it alleges, is the "breaching" action that led to the damages Plaintiff asserts. *Id.*

For substantially the same reasons identified in its consideration of the License Agreement's forum-selection clause, the Court should find that Plaintiff adequately pleads facts sufficient to support that Defendant Z so completely acquired Defendant Y's assets and took over its operations as to become Defendant Y's successor, sufficiently "closely related" to be bound to the contract despite being a non-signatory. As discussed below, the Court should also find that Plaintiff has adequately plead breach of contract and anticipatory breach of contract.

a. The Complaint Adequately Pleads a Breach of Contract

Under New York law, a claim for breach of contract must allege: "[i] the existence of an agreement, [ii] adequate performance of the contract by the plaintiff, [iii] breach of contract by the defendant, and [iv] damages." *Harsco Corp.* v. *Segui*, 91 F.3d 337, 348 (2d Cir. 1996). "In pleading these elements, a plaintiff must identify what provisions of the contract were breached as a result of the acts at issues." *Wolff* v. *Rare Medium, Inc.*,171 F.Supp.2d 354, 358 (S.D.N.Y. 2001). Accepting as true all well-pleaded factual allegations in the complaint as the Court must, the Court should find that Plaintiff has plead sufficient facts to allege its own adequate performance of the License Agreement.

The existence of the License Agreement is clear and the fact that Defendant Z is bound to it has been settled above and thus satisfies the first element of breach.

Plaintiff sufficiently alleged both its own adequate performance—satisfying the second element—and damages that it suffered—satisfying the fourth element of breach. Plaintiff stated that in reliance on the assurances of first Defendant Y and later Defendant Z, it continued its efforts under the License Agreement between July 2021 (when Defendants first began negotiating their transaction) until the end of December 2021 (when Plaintiff was at last informed of Defendant Z's consideration of a plan to terminate the Agreement), and that this effort amounted to more than one million dollars in investments in inventory and related expenses, advertising, marketing, and development. (Compl. at §§ 36-40). Plaintiff further alleges that it has suffered damages in an amount significantly higher than one million dollars, estimating the damages to exceed $35 million. (Compl. at § 55).

A determination of the remaining element of breach depends on an accurate reading of the License Agreement at issue. If, as Plaintiff alleges, Defendant's termination of the License Agreement constitutes a breach, then all elements of breach of contract have been satisfied.

Plaintiff alleges that Defendant Z's termination of the License Agreement was not authorized for multiple reasons: its interpretation of the Change of Control provision (Pl. Opp. Ex. B at § 9(f)), its interpretation of the Force Majeure provision (Pl. Opp. Ex. B at § 14), and its understanding that Defendant Y waived any potential justification based on sales targets in its communications with Plaintiff in late 2020.

The License Agreement between Plaintiff and Defendant Y provides that the initial term of the Agreement was to end on December 31, 2027 after which the Agreement would automatically renew for terms of one year unless terminated in accordance with the Agreement. (Pl. Opp. Ex. B at § 9(a)). What Plaintiff describes as the Change of Control Provision states:

> A party may terminate this Agreement upon written notice to the other party if (i) insolvency, bankruptcy, or similar proceedings are instituted by or against such party, (ii) there is any assignment or attempted assignment by such party for the benefit of creditors, (iii) there is any appointment, or application of such appointment of a receiver for such party; or (iv) there is a sale or transfer of all or substantially all of the assets, or a merger or consolidation of such party, or a transfer of ownership that results in a change of voting control of such party.

(Pl. Opp. Ex. B at § 9(f)). Plaintiff invokes the most recent antecedent grammatical canon, and provides compelling examples as to why any alternative to reading the provision as protecting the non-changing party (as opposed to the party experiencing the change of control) would result in absurd outcomes. Plaintiff's reading of the provision is the best reading. Further, accepting as true Plaintiff's factual allegations as to its communications with Defendants and the shipping difficulties it experienced, the Agreement's Force Majeure provision supports Plaintiff's assertion that Defendant's attempted termination of the Agreement was unauthorized and constitutes breach. (Pl. Opp. Ex. B at §§ 14; 9).

In sum, Plaintiff sufficiently alleged (i) the existence of an agreement, (ii) its own adequate performance of the contract, (iii) breach of contract by Defendant Z, and (iv) resulting damages. Thus, the Court should find that Complaint adequately pleads a breach of contract.

b. The Complaint Adequately Pleads Anticipatory Breach of Contract

As to Plaintiff's claim of anticipatory breach, "[a]nticipatory repudiation occurs when, before the time for performance has arisen, a party to a contract declares his intention not to fulfill a contractual duty." *Lucente* v. *Int'l Bus. Machines Corp.*, 310 F.3d 243, 258 (2d Cir. 2002). Anticipatory repudiation "can be either a statement by the obligor to the oblige indicating that the obligor will commit a breach that would itself give the oblige a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." *Princes Point LLC* v. *Muss. Dev. L.L.C.,* 30 N.Y.3d 127, 133, 87 N.E.3d 121 (2017) (quoting *Norcon Power Partners* v. *Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 463, 682 N.Y.S.d2 664, 705 N.E.2d 656 (1998)). "For an anticipatory repudiation to be deemed to have occurred, the expression of intent not to perform by the repudiator must be 'positive and unequivocal.'" *Princes Point LLC*, 30 N.Y.3d at 133 (quoting *Tenavision, Inc.* v. *Neuman*, 45 N.Y.2d 145, 150 (1978)). When confronted with an anticipatory repudiation, the non-repudiating party has two mutually exclusive options. It may either (i) "elect to treat the repudiation as an anticipatory breach and seek damages for breach of contract, thereby terminating the contractual relation between the parties," or (ii) "continue to treat the contract as valid and await the designated time for performance before bringing suit." *Lucente*, 310 F.3d at 258.

Plaintiff obviously has opted for the latter. (Compl. § 41) (stating that "[n]otwithstanding [Defendant's breach], [Plaintiff] continued performing its obligations under the Agreement . . . ."). As for a positive and unequivocal expression of intent not to perform by the repudiator, it is difficult to imagine a more unequivocal expression of intent not to perform than if Defendant, as alleged, informed Plaintiff of its intent to terminate i.e. cease compliance with the Agreement and follow through in announcing it has done so. (Compl. § 40; 42). As such, Plaintiff has adequately pleaded anticipatory repudiation of contract.

Applicant Details

First Name	**Evelyn**
Last Name	**McCorkle**
Citizenship Status	**U. S. Citizen**
Email Address	**epm2139@columbia.edu**
Address	**Address** **Street** **521 W. 111th Street, Apt 25A** **City** **New York** **State/Territory** **New York** **Zip** **10025**
Contact Phone Number	**7743924100**

Applicant Education

BA/BS From	**Barnard College**
Date of BA/BS	**May 2018**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law and Social Problems**
Moot Court Experience	**Yes**
Moot Court Name(s)	**1L General - Copyright**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Garnett, Margaret
margaretgarnett1@gmail.com
Briffault, Richard
richard.briffault@law.columbia.edu
212-854-2638
Metzger, Gillian
gmetzg1@law.columbia.edu

References

Daniel Richman, Paul J. Kellner Professor of Law at Columbia Law School (drichm@law.columbia.edu, 212-854-9370)

This applicant has certified that all data entered in this profile and any application documents are true and correct.

EVELYN MCCORKLE
521 West 111th Street, Apt 25A, New York, NY 10025 • (774) 392-4100 • epm2139@columbia.edu

June 21, 2023
The Honorable Morgan Christen
United States Court of Appeals
Ninth Circuit
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

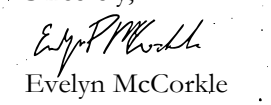
I am a rising third-year student, Harlan Fiske Stone Scholar, and Executive Board member of the *Journal of Law and Social Problems* at Columbia Law School. I write to apply for a clerkship in your chambers for the 2025-26 term. I am particularly interested in clerking for you because of your time as a state court judge on the Alaska Superior Court and the invaluable experience you bring to the bench as a longtime litigator. I hope to pursue a career in public integrity prosecution, which is active at both the state and federal level, and so I would be thrilled to work with a judge with your depth and diversity of experience.

I am also eager to contribute my diversity of experiences, strong research and writing skills, and intellectual curiosity to your chambers. I possess both criminal and civil experience and have pursued public sector work passionately. Prior to law school, I spent three years with the New York City Department of Investigation, where I developed an understanding of law enforcement operations and how federal criminal cases are built. I then interned with the E.D.N.Y. U.S. Attorney's Office, where I developed my legal research and writing skills by drafting memoranda and motions in limine. This summer, I will be interning at DOJ Main Justice, further developing my exposure to federal criminal law. On the civil side, I served as an intern in the spring for Judge Failla and while I participated in a diversity of matters, my written work was civil in nature. I crafted a response to a motion to compel arbitration, a ruling on a motion to remand, and a memorandum on personal jurisdiction. Now, my internship with Allen & Overy is exposing me to the complexities of civil commercial litigation.

As I develop my own skill set and style as a litigator, I want to clerk for a judge with your experience as an advocate. Moreover, having interned in a district court, I am now eager to clerk at the appellate level—to delve deeper into the law, and learn about trial work using a retrospective analysis. Thank you for your consideration, and please do not hesitate to contact me if you need further information.

Enclosed please find my resume, transcript, and writing sample, which more fully detail my skills and experience. Following separately are letters of recommendation from Columbia Law School Professors Gillian Metzger (gem3@columbia.edu, 646-530-0640) and Richard Briffault (rbl4@columbia.edu, 212-854-2638), as well as Deputy U.S. Attorney for the Southern District of New York Margaret Garnett (margaretgarnett1@gmail.com).

Sincerely,



Evelyn McCorkle

EVELYN MCCORKLE

521 West 111th Street, Apt 25A, New York, NY 10025 • (774) 392-4100 • epm2139@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D. expected May 2024
Honors: Harlan Fiske Stone Scholar
Activities: *Journal of Law and Social Problems*, Executive Finance Editor (duties include engaging in all final reads with EIC and EE, running *JLSP* special projects, and reporting annual financials to the Board)
OutLaws, Judiciary Chair
Columbia Law Women's Association, Treasurer

Barnard College, Columbia University, New York, NY
B.A. received in Political Science May 2018
Minor: Economics
Honors: Dean's List (5/8 semesters)
Activities: Student Government Associate, VP of Finance
Research Assistant to Barnard College President Debora Spar
Bard Globalization and International Affairs Program

EXPERIENCE

Department of Justice Public Integrity Section, Washington, D.C.
Incoming Summer Intern Starting July 2023

Allen & Overy, New York, NY
Summer Associate May 2023 – July 2023
Researching and writing for: a CJA RICO conspiracy defense, a pro bono asylum matter, and a white collar/securities regulation cryptocurrency defense.

Office of the Hon. Judge Katherine Polk Failla, New York, NY
Spring Extern January 2023 – April 2023
Performed legal research and writing (produced a written opinion as to a motion to compel arbitration, an oral decision as to a motion to remand or in the alternative vacate without prejudice, and a memorandum on personal jurisdiction). Participated in proceedings (criminal and civil) taking notes for clerks.

United States Attorney's Office for the Eastern District of New York, Brooklyn, NY
Summer Legal Intern May 2022 – August 2022
Conducted legal research and drafted memoranda regarding findings for cases from the Public Integrity and General Crimes sections. Drafted motions in limine for use in ongoing cases. Participated in internal meetings, proffers, witness preparation sessions, status conferences, and trials.

NYC Department of Investigation, New York, NY
Confidential Investigator June 2018 – September 2021
Investigated cases of corruption, fraud, and other illegal activities committed by elected officials and other city employees, agencies, and nonprofit organizations receiving city funding. Produced policy recommendations and public reports on findings or referred cases for prosecution. Wrote three annual Anticorruption Reports for DOI Squad 5, covering corruption vulnerabilities and mitigation efforts undertaken by the agencies under Squad 5 oversight. Conducted surveillance, forensic accounting, wires, interviews, and arrests.

New Sanctuary Coalition, New York, NY
Pro Se Clinic Volunteer October 2019 – June 2021
Aided asylum seekers by completing I-589s, drafting affidavits, and working with assigned attorneys.

SKILLS AND INTERESTS

French (proficient) • NY State Rape Crisis Counselor • Car Camping • Crossfit • Dungeons & Dragons

Columbia Law School

Registration Services

law.columbia.edu/registration
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registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

05/23/2023 21:14:56

Program: Juris Doctor

Evelyn P McCorkle

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A-
L6661-1	Ex. Federal Court Clerk - SDNY	Radvany, Paul	1.0	CR
L6661-2	Ex. Federal Court Clerk - SDNY - Fieldwork	Radvany, Paul	3.0	CR
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	A-
L9137-1	S. Sentencing	Richman, Daniel; Sullivan, Richard	2.0	A

Total Registered Points: 12.0

Total Earned Points: 12.0

January 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L8899-1	S. Practicing International Law: Maritime Conflicts and Law of the Sea	Harris, Robert; Waxman, Matthew C.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-2	Evidence	Capra, Daniel	4.0	B+
L6425-1	Federal Courts	Metzger, Gillian	4.0	B
L6269-1	International Law	Damrosch, Lori Fisler	3.0	A
L6675-1	Major Writing Credit	Metzger, Gillian	0.0	CR
L8812-1	S. Public Integrity and Public Corruption [Minor Writing Credit - Earned]	Briffault, Richard	2.0	A
L6683-1	Supervised Research Paper	Metzger, Gillian	1.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B+
L6679-1	Foundation Year Moot Court		0.0	CR
L6121-12	Legal Practice Workshop II	McCamphill, Amy L.	1.0	P
L6169-1	Legislation and Regulation	Metzger, Gillian	4.0	A
L6116-4	Property	Merrill, Thomas W.	4.0	B
L6118-2	Torts	Rapaczynski, Andrzej	4.0	B

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-6	Legal Methods II: International Problem Solving	Hakimi, Monica	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	B
L6133-2	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	B
L6105-4	Contracts	Emens, Elizabeth F.	4.0	B+
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-12	Legal Practice Workshop I	McCamphill, Amy L.; Yoon, Nam Jin	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 59.0

Total Earned JD Program Points: 59.0

Issue Date: 06/17/2020

BARNARD COLLEGE TRANSCRIPT

NAME McCorkle, Evelyn P.
ADDRESS ON ADMISSION 15 Pleasant View Avenue Falmouth MA 02540-3136

BARNARD ID 1728157
BIRTH DATE 02/24/1996
ISSUE DATE 06/17/2020

ENTERED FALL 2015 TRANSFER DEGREE BACHELOR OF ARTS, May 16, 2018
FROM University of Washington Seattle, WA

MAJOR Political Science - Sr Req:Pass
MINOR Economics

TRANSFER CREDIT

UNIV OF WASHINGTON 14-15	30.0	

ADVANCED PLACEMENT CREDIT

ENGLISH LIT/COMP	3.0	
FRENCH	6.0	
U. S. HISTORY	3.0	

FALL 2015

AFRS BC3528	HIST CULT POLIT ECON HARLEM	4.0	A
ECON BC2075	LOGIC LIMITS ECONOMIC JUSTICE	3.0	B+
ECON BC2411	STATISTICS FOR ECONOMICS	4.0	B
POLS V1013	POLITICAL THEORY I	4.0	B+
		15.0	3.41

SPRING 2016

ECON BC1007	MATH METHODS FOR ECONOMICS	4.0	A-
ECON BC3033	INTERMEDTE MACROECONOMC THEORY	4.0	B-
ECON BC3041	THEORETICL FOUNDTNS-POLIT ECON	3.0	A-
POLS V1601	INTERNATIONAL POLITICS	3.0	A-
PHED BC1589	WOMEN'S STRENGTH	1.0	P*
		15.0	3.41

FALL 2016

CPLT BC3110	INTRO TO TRANSLATION STUDIES	3.0	A
ECON BC3035	INTERMEDTE MICROECONOMC THEORY	4.0	B+
EESC BC1001	ENVIRONMENTAL SCIENCE I	4.5	A+
POLS BC3500	COLL:POLIT ECON:CORRPTN/CONTRL	4.0	A-
		15.5	3.83

On Dean's List for Fall 2016

SPRING 2017

EESC BC1002	ENVIRONMENTAL SCIENCE II	4.5	A+
POLS BC3254	FIRST AMENDMENT VALUES	3.0	A
POLS BC3543	COLL:NON-STATE GOV CRIME/WAR	4.0	A-
VIAR UN1000	BASIC DRAWING	3.0	A+
		14.5	4.07

On Dean's List for Spring 2017

FALL 2017

ECON BC3018	ECONOMETRICS	4.0	P
ECON BC3024	MIGRATION & ECONOMIC CHANGE	3.0	B+
ECON BC3063	SR SEM:STEREOTYPES,CRIME,JSTC	4.0	A
POLS UN1201	INTRO TO AMERICAN POLITICS	4.0	A
		15.0	3.81

SPRING 2018

ECON GU4228	URBAN ECONOMICS	3.0	B
ECON UN3025	FINANCIAL ECONOMICS	3.0	UW
POLS BC3055	COLL:POL VIOLENCE & TERRORISM	4.0	A-
POLS GU4845	NAT SECURITY STRAT OF MID EAST	4.0	A
		11.0	3.62

On Dean's List for Spring 2018

BARNARD POINTS COMPLETED [GPA]	86.0	3.69
TRANSFER POINTS	30.0	
SUMMER POINTS	0.0	
OTHER POINTS	12.0	
CUMULATIVE POINTS COMPLETED	128.0	

Jennifer Simmons
Barnard College Registrar

June 21, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I am delighted to provide you with this letter of recommendation for Evelyn McCorkle, who I understand has applied for a clerkship with your chambers. I first came to know Evelyn when I was the Commissioner of the New York City Department of Investigation, where she worked as an Investigator prior to law school. DOI is the inspector general for all of New York City government, and Evelyn was assigned to Squad 5, which covers the non-profit contracting sector as well as all City elected officials, including the Mayor and City Hall. As a consequence, Evelyn worked on many highly sensitive and complex matters, always distinguishing herself with her work ethic, attention to detail, and determination to follow the facts wherever they led.

I worked directly and closely with Evelyn when she was one of the investigators assigned to a series of allegations related to the possible misuse of his NYPD security detail by the Mayor and his family. Because of the high-profile and sensitive nature of the investigation, I was personally involved in both the investigation and the writing and editing of the report that we ultimately issued in the fall of 2021. Thus, I had much more exposure to Evelyn and to her work than would typically be the case for a Commissioner and an entry-level investigator in the agency. Although Evelyn was barely a year out of college when the investigation began, she quickly became a key member of the team, with great investigative instincts, maturity beyond her years in handling difficult and contentious interviews, and tremendous dedication to advancing the investigation despite the challenges presented by the COVID-19 pandemic. I personally attended the investigative interviews of the Mayor and First Lady, given the sensitivities involved, and I watched with pride as Evelyn, together with her investigative partner, led these interviews with confidence, poise, professionalism, and outstanding judgment. Although Evelyn was about to leave DOI to begin law school at Columbia, she also contributed significantly to the drafting and editing of the public report outlining our findings. Such was Evelyn's dedication to this project and to her colleagues on the investigative team, that even after starting law school she continued to work on an hourly basis in order to ensure that she could contribute to the final report, issued in early October 2021.

In November 2021, I left DOI to return to the United States Attorney's Office for the Southern District of New York, to become the Deputy U.S. Attorney. I had previously served as an AUSA in that Office from 2005 to 2017, including as the Chief of the Violent & Organized Crime Unit, and the Chief of Appeals. I have stayed in close contact with Evelyn, as a mentor, since she left DOI for law school, and have seen her continue to grow professionally and seek out every opportunity to achieve her goals as a lawyer.

I am confident that Evelyn would be an asset to any District Court chambers — she is bright, hardworking, organized, and able to juggle multiple competing priorities effectively. She is insightful about people and their motivations and has great professional judgment. On an interpersonal level, she is a delight — funny, kind, optimistic, a selfless teammate — particularly important in the small and close-knit environment of chambers. Despite the significant gap in our positions at DOI, Evelyn had a wonderful manner with me — deftly navigating being appropriately deferential while also participating fully and thoughtfully in the robust debate that I insisted on from the team in such a sensitive and important investigation. I think many of these dynamics mirror what I imagine you might seek from your law clerks, and I firmly believe Evelyn will be up to the task. Finally, I know that Evelyn has a tremendous heart for public service, and that she is looking to her clerkship as the next step to prepare her for such a career. I know that she will bring the same integrity, commitment, and public-minded spirit to her work as a law clerk that she did to her work at DOI and to her internships in the EDNY U.S. Attorney's Office, at the Public Integrity Section of DOJ, and with Judge Failla.

Although I can't speak directly to Evelyn's legal analysis and legal writing (and I understand Dean Metzger's letter will address those), in all other respects I give Evelyn my strongest recommendation. Please don't hesitate to contact me if I can answer any questions or be of further assistance to you in the law clerk selection process. You can reach me by email at Margaret.garnett@usdoj.gov, or by phone at 212-637-1591 or 646-483-4406.

Margaret Garnett - margaretgarnett1@gmail.com

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 21, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Re: Evelyn P. McCorkle

Dear Judge Christen:

I am writing in support of Evelyn P. McCorkle of the Columbia Law School Class of 2023, who is applying to you for a clerkship. Evelyn has excellent research and writing skills, an enthusiasm for learning and the law, and a demonstrated commitment to public service. She will make an excellent law clerk.

I taught Evelyn in two courses – Legal Methods in the Fall 2021 term and the Seminar on Public Integrity and Public Corruption in the Fall 2022 term. Legal Methods is Columbia's intensive "introduction-to-law" course, given at the start of the 1L year, to initiate students into the case method, statutory interpretation, and legal reasoning. Evelyn got off to a strong start in Le-gal Methods, demonstrating understanding of the material and eager engagement with legal analysis. As the course is taught on a pass-fail basis, I did not have occasion to closely evaluate her work.

Evelyn was an outstanding participant in my Seminar, which combines material on the white-collar crime aspects of corruption, with campaign finance law, lobbying regulation and government ethics. She was a frequent and insightful participant in class discussions, often taking the lead in analyzing the cases and statutes and linking them to current problems. She wrote four excellent reaction papers that displayed a close reading of the assignment and thoughtful assessment of the reasoning or arguments in the material. Over the course of the semester, she was in-creasingly attentive to the complexities of the subject – the risks of overcriminalization, the potential benefits of what is often pejoratively referred to as the "revolving door," and the difficulties of effectively regulating campaign finance and lobbying. Evelyn wrote an outstanding re-search paper on municipal offices of inspectors general, in which she compared the offices in New York City and Atlanta with respect to the motives for their creation, the type of oversight in which the office engages, the nature of its powers, its investigative authority, and its insulation from political control. The paper was thoroughly researched and very well written. Together the strength of the paper and quality of Evelyn's classroom work and reaction papers made it easy to give her an A for the Seminar.

Evelyn has a strong background in, and commitment to, public integrity work. Before coming to law school, she worked for three years as a confidential investigator at the New York City Department of Investigations. During her 1L year, she came to see me to discuss both law school and career opportunities in public integrity work. In addition to her Seminar classroom work, we have had extensive office discussions of the importance and challenges of that work.

Evelyn has excellent research and writing skills and legal experience, and she is deeply committed to public service. In her 1L summer, she worked as an intern in the United States Attorney's Office for the Eastern District of New York, where she conducted legal research and drafted memoranda regarding findings for cases from the Public Integrity and General Crimes sections. This past spring she was an extern in the Office of the Hon. Katherine Polk Failla, and this summer she will be an intern in the Public Integrity Section of the Department of Justice in Washington, D.C.

Beyond her specific experiences, strengths, and commitments, Evelyn brings an almost joyful curiosity to her work. She delights in learning and discussing law. She has an unusual zest to doctrinal analysis and legal research. I am sure you will find her a pleasure to have in your chambers.

Based on her strong research and writing skills, her demonstrated commitment to public service, and her enthusiasm for legal work, I am happy to recommend Evelyn P. McCorkle to you for a clerkship.

All the best,

Richard Briffault
Joseph P. Chamberlain Professor of Legislation

Richard Briffault - richard.briffault@law.columbia.edu - 212-854-2638

June 21, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I'm writing to recommend Evelyn McCorkle, a rising Columbia Law School 3L, for a clerkship in your chambers. Evelyn is an extremely smart and thoughtful law student with a deep commitment to public service. Teaching her has been a pleasure, and I'm sure she would be a wonderful and valued addition to chambers.

I have taught Evelyn in two classes at Columbia: Legislation and Regulation and Federal Courts. Evelyn got an A- in LegReg and was a very strong and important contributor to the class. Her comments were always nuanced and original, drawing insights from the three years she spent working in a local administrative office before law school. She is also very adept at doctrinal analysis. I would keep an eye out to make sure to call on her whenever she volunteered because I found her comments so valuable—and cold-calling her repeatedly seemed unfair!

I also enjoyed having Evelyn in Federal Courts. It was a much larger class with fewer volunteer opportunities, and I know for personal reasons it was a challenging time for her. Even so, Evelyn made great contributions when I called on her, and her comments in class and in office hours demonstrated a strong grasp of the material. I do not believe that the B grade she got in the class is an accurate reflection of her ability or understanding of Federal Courts. Indeed, what strikes me when I look at Evelyn's transcript is the strong trajectory upward. Like many students who took a few years off, it took her a little while to adjust to law school, but her grades 2L year are more in keeping with her impressive abilities.

I also supervised Evelyn's note, which is a well-written, comprehensive, and carefully argued assessment of judicial recusal reform. I was particularly impressed by Evelyn's initiative and ability to work independently. She had identified the topic and undertaken substantial research before we had our first substantive meeting—a very rare occurrence in my experience! Evelyn was never defensive but instead responded to criticism by rethinking her analysis and deepening her arguments in the process.

Finally, Evelyn is notably mature and has a warm and engaging manner. I really enjoyed our conversations about her note; Evelyn's excitement about her topic was always evident and contagious. She has a deep commitment to working on public corruption issues, and her enthusiasm for public service is a joy to see. I am confident you would enjoy working closely with her.

Please do not hesitate to contact me if there is any further information on Evelyn that I can provide.

Very truly yours,

Gillian E. Metzger

Gillian Metzger - gmetzg1@law.columbia.edu

EVELYN MCCORKLE
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WRITING SAMPLE

This writing sample is a bench memorandum that I prepared while interning for Judge Katherine Polk Failla of the Southern District of New York. I received permission from the Judge to redact and rework the memo so that it could be used as a writing sample. For brevity I removed all but the discussion section, and for privacy I redacted all identifying information from the body of the memo itself. This has been edited only by me.

Summary of the Facts:

Plaintiff is an American board game company that entered into an agreement with Defendant Y, a British board game company. The agreement in question, termed the "License Agreement," included a forum selection clause, and limited how and when the License Agreement could be terminated. A number of years after the initial License Agreement was signed, another British board game company—Defendant Z—bought Defendant Y. Ultimately, Defendant Z then instructed Plaintiff that it was terminating the License Agreement. As a result, Plaintiff brought this suit against both Defendant Y and Defendant Z in the Southern District of New York, pursuant to the forum selection clause in the License Agreement. Defendant Z moves the Court to dismiss for lack of personal jurisdiction, and for failure to state a claim.

DISCUSSION

Defendant Z moves the Court to dismiss for lack of personal jurisdiction, and for failure to state a claim. The Court should address the issues in the following order: (i) personal jurisdiction over Defendant Z, and (ii) failure to state a claim. Personal jurisdiction is a threshold issue—the case must be dismissed if the plaintiff fails to meet its burden of demonstrating that jurisdiction exists. As discussed below, the Court should deny both of Defendant's motions, finding that Plaintiff has sufficiently alleged jurisdiction under the successor-in-interest and "closely related" doctrines, and that Plaintiff has adequately alleged facts to state its claims.

A. Personal Jurisdiction

Defendant Z moves the Court pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure to dismiss it for lack of personal jurisdiction. Defendant Z further alleges that regardless, personal jurisdiction should be foreclosed by the due process guarantees of the Constitution, because—it alleges—it has not had the "minimum contacts" with New York necessary to be subject to jurisdiction here. *Id.* at 2.

The parties do not dispute that by its terms Defendant Z is not a signatory to the License Agreement between Plaintiff and Defendant Y. Rather, Plaintiff argues that personal jurisdiction nevertheless exists pursuant to either a theory of successor assumption of liability, or the "closely related" doctrine. (Pl. Opp. at 6-7). Defendant Z contends that its "parent-subsidiary" relationship with Defendant Y is insufficient to enforce the License Agreement's forum selection clause against it under the "closely related" doctrine. (Def. Br. at 1-2).

The Court should recognize that the law in this area is actively developing, but find that Plaintiff has alleged sufficient facts to support that Defendant Z has more than just a "parent-subsidiary" relationship with Defendant Y under either doctrine. Defendant Z has assumed Defendant Y's liabilities under New York law such that it can be bound by the License Agreement's forum selection clause and is subject to personal jurisdiction in New York. As such the Court should deny Defendant Z's motion to dismiss.

1. Applicable Law

"On a Rule 12(b)(2) motion, plaintiff carries the burden of demonstrating that jurisdiction exists, and where the district court did not conduct a full-blown evidentiary hearing on a motion, the plaintiff need make only a *prima facie* showing of jurisdiction." *Penachio* v. *Benedict*, 461 F. App'x 4, 5 (2d Cir. 2012) (summary order) (internal quotation marks and citations omitted). In deciding a Rule 12(b)(2) motion, the Court "construe[s] the pleadings and affidavits in the light most favorable to [the plaintiff], resolving all doubts in [its] favor." *DiStefano* v. *Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001). However, the Court cannot "draw argumentative inferences in the plaintiff's favor" and need not "accept as true a legal conclusion couched as a factual allegation." *O'Neill* v. *Asat Trust Reg.*, 714 F.3d 659, 673 (2d Cir. 2013).

If the Court lacks personal jurisdiction over a defendant, the claims against that defendant must be dismissed. However, in deciding a pretrial motion to dismiss for lack of personal jurisdiction "a district court has considerable procedural leeway." *Marine Midland Bank, N.A.* v. *Miller*, 664 F.2d 899, 904 (2d Cir. 1981) (citations omitted). The Court may "determine the motion on the basis of

affidavits alone or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion." *Id.* Still, the "[p]laintiff ultimately bears the burden of establishing personal jurisdiction by a preponderance of the evidence, either at an evidentiary hearing or at trial." *Metro-Goldwyn-Mayer Studios Inc.* v. *Canal+ Distribution S.A.S.*, No. 07 Civ. 2918 (DAB), 2010 WL 537583, at *5 (S.D.N.Y. Feb. 9, 2010).

"As a general rule," New York contract law does not hold an entity "purchasing the assets of another … liable for the debts and liabilities of the seller." *Miller* v. *Mercuria Energy Trading, Inc.*, 291 F. Supp. 3d 509, 525 (S.D.N.Y. 2018), *aff'd* 774 Fed. App'x 714 (2d Cir. 2019). However, the general rule does not apply in four scenarios: where "[i] a buyer who formally assumes a seller's debts; [ii] transactions undertaken to defraud creditors; [iii] a buyer who de facto merged with a seller; and [iv] a buyer that is a mere continuation of a seller." *Aguas Lenders Recovery Grp.* v. *Suez, S.A.*, 585 F.3d 696, 702 (2d Cir. 2009). Each scenario communicates a sufficiently close relationship between buyer and seller to bind the buyer to the seller's obligations. The third scenario, "buyer who de facto merges with a seller," can be satisfied by a successor-in-interest analysis. "Thus, for example, 'when a successor firm acquires substantially all of the predecessor's assets and carries on substantially all of the predecessor's operations, the successor may be held to have assumed its predecessor's . . . liabilities, notwithstanding the traditional rule.'" *Aguas Lenders Recovery Grp.*, (2d Cir. 2009) (ellipses in original) (quoting *Nettis* v. *Levitt*, 241 F.3d 186, 193 (2d Cir. 2001), overruled on other grounds by *Slayton* v. *Am. Express Co.*, 460 F.3d 215 (2d Cir. 2006)). The Second Circuit has further held that successors to contracts under the de facto merger doctrine should be prevented "from using evasive, formalistic means lacking economic substance to escape contractual obligations." *Nitro Elec. Co., Inc.* v. *ALTIVIA Petrochemicals, LLC*, No. 3:17 Civ. 2412 (RCC), 2017 WL 6567813, at *4 (S.D.W. Va. Dec. 22, 2017). There appears to be a degree of overlap between the successor-in-interest/de facto merger doctrine and the "closely related" doctrine that also stems from *Aguas*, in that courts have found that successors-in-interest can in some circumstances satisfy the "closely related" test. *See Vuzix Corp.* v. *Pearson*, No. 19 Civ. 689 (NRB) 2019 WL 5865342, at *5 (S.D.N.Y. November 6, 2019) quoting *Affiliated FM Ins. Co.* v. *Kuehne + Nagel, Inc.*, 328 F. Supp. 3d 329, 336 (S.D.N.Y. 2018); *see also Miller v. Mercuria Energy Trading, Inc.* 291 F. Supp. .3d 509, 524-25 (S.D.N.Y. 2018) (collecting cases).

As evidenced by the availability of both the successor-in-interest doctrine discussed above, and the "closely related" doctrine to follow, the Second Circuit has "declined to adopt a standard governing precisely 'when a signatory may enforce a forum selection clause against a non-signatory.'" *Fasano* v. *Li*, 47 F.4th 91, 103 (2d Cir. 2022) (quoting *Magi XXI, Inc.* v. *Stato della Città del Vaticano*, 714 F.3d 714, 723 N.10 (2d Cir. 2013)). Under the "closely related" doctrine, non-signatories may be bound by forum selection clauses where, "under the circumstances, the non-signatories enjoyed a sufficiently close nexus to the dispute or to another signatory such that it was foreseeable that they would be bound." *Fasano*, 714 F.3d at 103. Under this doctrine, a signatory to a contract may invoke a forum selection clause against a non-signatory if the non-signatory is "closely related" to one of the signatories. *Metro-Goldwyn-Mayer Studios Inc.*, 2010 WL 537583, at * 5 (internal quotation marks and citations omitted). Non-signatories have been found "closely related" where their interests are "completely derivative of" and "directly related to, if not predicated upon" the signatories' interests or conduct. *Id.* Courts typically find parties to be "closely related" in two situations: "where the non-signatory had an active role in the transaction between the signatories or where the non-signatory had an active role in the company that was the signatory." *Affiliated FM Ins. Co.,* 328 F. Supp. 3d at 336 (internal quotation marks omitted). But, as discussed above, courts in this district have also found that "successors-in-interest . . . at least in some instances, satisf[y] the 'closely related' test." *Vuzix Corp.*, 2019 WL 5865342, at *5 quoting *Affiliated FM Ins. Co.,* 328 F. Supp. 3d at 336.

In recent years, a number of courts in the Southern District of New York have argued that while the *Aguas* doctrines are appropriate as to motions to dismiss based on grounds of improper venue and forum non conveniens, motions to dismiss for lack of personal jurisdiction are different. *See e.g., Arcadia Biosciences, Inc.* v. *Vilmorin & Cie*, 356 F. Supp. 3d. 379, 389 (S.D.N.Y. 2019). These courts assert that "the rules governing personal jurisdiction" are "driven by constitutional concerns over the court's power to exercise control over the parties." *Id.* at 389 (internal quotation marks and citations omitted). Under this argument, plaintiffs must make some showing that defendants have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Courts in these circumstances may not exercise personal jurisdiction unless "the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2L.Ed.2d 1283 (1958).

Some courts have found that these constitutional requirements "caution against a liberal application of forum selection clauses to non-signatory defendants." *Arcadia Biosciences, Inc.* 356 F. Supp. 3d at 389; *see also Mersen USA EP Corp.* v. *TDK Electronics Inc.*, 594 F. Supp. 3d 570 (S.D.N.Y. 2022). However, other courts—inside and outside this district—have found that the "closely related" doctrine can justify the exercise of personal jurisdiction over non-signatory defendants regardless of whether they had previous minimal contacts with the forum state. *See, e.g., Metro-Goldwyn-Mayer Studios Inc.*, 2010 WL 537583, at * 5; *Franklink Inc.* v. *BACE Servs., Inc.*, 50 F.4th 432, 437, 441-43 (5th Cir. 2022).

2. The Court Has Personal Jurisdiction Over Defendant Z.

Personal jurisdiction is a threshold issue; as such, the Court begins by determining whether Defendant Z has consented to personal jurisdiction, and whether the exercise of personal jurisdiction over Defendant Z comports with the constitutional requirements of due process. *See Basile* v. *Walt Disney Co.*, 717 F. Supp. 2d 381, 385 (S.D.N.Y. 2010) ("[V]enue and personal jurisdiction are threshold procedural issues to be decided before the substantive grounds in a motion to dismiss.").

The License Agreement signed by Plaintiff and Defendant Y contains the following forum selection clause:

> (1) This Agreement shall be construed in accordance with the law of the state of New York, United States, without respect to its choice of law principles . . . Any legal action or proceeding arising under this Agreement will be brought exclusively in the federal or state courts located in New York City, United States, and each party irrevocably consents to personal jurisdiction and venue therein and waives any claim of improper venue or inconvenient forum. In the event of a dispute arising out of or relating to this Agreement, the prevailing party shall be entitled to receive from the other party its reasonable attorneys' fees and costs.

(Pl. Opp. Ex. B at § 16). Given the inclusion of this forum selection clause in the License Agreement between Plaintiff and Defendant Y, a determination of personal jurisdiction depends on whether Defendant Z, a non-signatory to the License Agreement, can nonetheless be bound by it. If

Defendant Z is bound by the License Agreement it has consented to personal jurisdiction in this Court.

To make this determination, the Court should turn to the two doctrines under *Aguas* discussed above. The first, successor-in-interest/de facto merger liability, occurs "when a successor firm acquires substantially all of the predecessor's assets and carries on substantially all of the predecessor's operations, [such that] the successor may be held to have assumed its predecessor's . . . liabilities, notwithstanding the traditional rule." *Aguas Lenders Recovery Grp.*, 585 F.3d at 702 (2d Cir. 2009) (ellipses in original and internal citations omitted). The second line of cases concerns the "closely related" doctrine, but because the "closely related" test can be satisfied by a successor-in-interest finding, the Court should proceed first with that analysis. *Vuzix Corp.*, 2019 WL 5865342, at *5 quoting *Affiliated FM Ins. Co.,* 328 F. Supp. 3d at 336.

a. Defendant Z is a Successor-in-Interest to Defendant Y

"[W]hen a successor firm acquires substantially all of the predecessor's assets and carries on substantially all of the predecessor's operations, the successor may be held to have assumed its predecessor's . . . liabilities, notwithstanding the traditional rule [that an entity purchasing the assets of another is not liable for the debts and liabilities of the seller]." *Aguas Lenders Recovery Grp.*, 585 F.3d at 702 (2d Cir. 2009) (ellipses in original and omitting internal citations). Here, though the exact nature of the Defendant Z purchase of Defendant Y is unclear (Pl. Opp. at 4), Defendant Z acknowledges a parent-subsidiary relationship between the defendants (Def. Br. at 1). Though Defendant Y remains in existence at least on paper, Plaintiff alleges that after Defendant Z made its purchase of Defendant Y, it took over all communications with Plaintiff, and ultimately Defendant Z—not Defendant Y—notified Plaintiff that it was terminating the License Agreement. (Compl. § 42; Pl. Opp. at 2). Plaintiff further alleges that Defendant Y "effectively has zero ongoing operations," and that Defendant Z personnel conduct the marketing for Defendant Y products, and handle "all account, customer/sales and support inquiries about [Defendant Y] products" directed to Defendant Z email addresses, such that customers contacting Defendant Y getting replies from support@"Z"hqhelp.zendesk.com. (Pl. Opp. at 6-7).

Moreover, there appears to be no dispute between Plaintiff and Defendant Z that Defendant Z acquired substantially all of Defendant Y's assets. The "Notice of Termination of Brand/Product License Agreement," which was sent to Plaintiff on January 21, 2022, states in relevant part "As you know, all of the asserts and outstanding ownership shares of [Defendant Y] were sold to [Defendant Z] pursuant to that certain Share Purchase Agreement by and among Mr. Z and Mrs. Z, [Defendant Z], dated as of September 23, 2021." *Id.* While it is true, as Defendant Z argues, that "a forum selection clause may not be enforced against a non-signatory parent corporation solely by virtue of its status as a parent corporation," *Array Biopharma, Inc.* v. *AstraZeneca PLC*, No. 18-cv-235 (PKC) 2018 WL 3769971, at *1 (S.D.N.Y. Aug. 9, 2018), the Notice of Termination email merely serves to confirm Plaintiff's allegations to the effect that Defendant Z acquired substantially all of Defendant Y's assets, while the rest of Plaintiff's alleged facts support their assertion that there exists more than a parent-subsidiary relationship between the Defendants in this case. Plaintiff has compellingly alleged that Defendant Z has also taken over substantially all of Defendant Y's operations. (Pl. Opp. at 9) ("Defendant Y has no employees, no officers, no directors, and no independent financial resources other than those held by Defendant. If Defendant Z is not *de jure* Defendant Y at this point, it is certainly *de facto* Defendant Y.").

Moreover, Plaintiff convincingly argues that Defendant Z was aware of the existence of the forum selection clause and that it might be defensively invoked. (Compl. §§ 35; 37-39). While the precise corporate relationship between Defendant Z and Defendant Y is unclear at this stage of litigation, the facts alleged by Plaintiff suffice for the Court to conclude that Defendant Z is Defendant Y's successor-in-interest under New York law. *See Metro-Goldwyn-Mayer Studios Inc.* v. *Canal+Distribution S.A.S.*, No. 07-civ-2918 (DAB), at *5 (S.D.N.Y. Feb. 9, 2010) (finding that a successor-in-interest owning a majority of signatory's shares, despite an unclear corporate relationship, is sufficient basis to conclude the plaintiff may invoke the contractual forum selection clause against the non-signatory entities that are "closely related" and deny defendants' motion to dismiss for lack of personal jurisdiction).

Plaintiff has adequately alleged that Defendant Z acquired substantially all of Defendant Y's assets and has taken on substantially all of its operations, thus fitting squarely in the role of successor under the *Aguas* line which permits exception to the general rule and provides an argument that Defendant Z is bound by the License Agreement and has consented to personal jurisdiction in New York. *Aguas*, 585 F.3d at 702. Resolving all doubts in Plaintiff's favor, *see DiStefano*, 286 F.3d at 84, the facts support that Defendant Z de facto merged with and is the successor to Defendant Y such that it may be held to the License Agreement's forum selection clause. *Aguas,* 585 F.3d at 702.

b. As Its Successor-in-Interest, Defendant Z is "Closely Related" to Defendant Y

Plaintiff would no doubt argue that the Court's analysis could end here, because it has sufficiently pleaded that Defendant Z is a successor-in-interest to Defendant Y. But Defendant Z argues that more is needed for a party to be found "'closely related' to the dispute such that it becomes 'foreseeable' that it will be bound." (Def. Br. at 7) (quoting *Cuno, Inc.* v. *Hayward Indus. Prods., Inc.*, No. 03-civ-3076 (MBM), 2005 WL 1123877, at *6 (S.D.N.Y. May 10, 2005) (internal citations omitted). Defendant Z asserts that Plaintiff has failed to allege foreseeability under a *Fasano* framework—which finds foreseeability where "[i] . . . the non-signatory acquiesce[s] to the forum selection clause 'by voluntarily bringing suit with signatories'; [ii . . .] non-signatories provide . . . letters of credit to signatories and 'ha[ve] interests in the litigation that were directly related to, if not predicated upon those of the signatories'; and [iii] where non-signatories were . . . integrally related to signatories 'such that suit should be kept in a single forum.'" (Def. Br. at 7) (quoting *Fasano* at 103-04) (internal citations omitted).

Defendant Z also attempts to differentiate *Fasano* by emphasizing that the Second Circuit's decision there turned on the fact that "'it was repeatedly stated' that the non-signatory defendants would undertake the conduct underlying the complaint subject to the terms of conditions of 'the contract that contains the Forum Selection Clause' rendering 'reasonably foreseeable'" they would be bound. (Def. Br. at 7-9). Defendant Z argues that Plaintiff has failed to allege similar facts, and is unable to show that Defendant Z could have foreseen being the subject to the forum selection clause.

It *is* reasonable to differentiate *Fasano* from the case at hand; the License Agreement between Defendant Y and Defendant Z has not been provided to the Court, and so it is not clear whether Defendant Z was forewarned that it would be subject to the License Agreement with Plaintiff in the very explicit way the Second Circuit held that the defendant was in *Fasano*. If the License Agreement between Defendant Z and Defendant Y was that explicit, the Court has had no opportunity to confirm as much. In fact, Plaintiff makes complaints to this effect, noting that Defendant Z has refused to

produce documents in response to Plaintiff's discovery requests. (Pl. Opp. 2; 5). This does not, however, mean that the Court cannot find Defendant Z sufficiently "closely related" to Defendant Y for it to have been foreseeable that it could be bound as a non-signatory to the License Agreement. It is true that many courts have found parties "closely related" under *Aguas* for the reasons Defendant Z discusses, such as where defendants have had an active role in the initial transaction, or had a close relationship to the signatory at the time of the agreement. This does not refute the fact that still other courts have found parties "closely related" as "non-signatory alter egos, corporate executive officers, and successors-in-interest." *Affiliated FM Ins. Co.*, 328 F. Supp. 3d at 336; *see also Miller v. Mercuria Energy Trading, Inc.* 291 F. Supp. .3d 509, 524-25 (S.D.N.Y. 2018) (collecting cases).

Under a theory of successor-in-interest, and thus permissively under the "closely related" doctrine, Plaintiff has adequately alleged that Defendant Z should be bound to the License Agreement at issue and to the forum selection clause therein. This finding brings the Court to the final argument Defendant Z asserts with respect to its 12(b)(2) motion: that applying precedent from the *Aguas* line, including the "closely related" doctrine, is inappropriate in the personal jurisdiction context as it raises due process concerns. (Def. Br. at 10); *see also Mersen USA,* 2022 WL 902372, at *10; *Arcadia* 356 F.Supp.3d at 395.

c. The "Closely Related" Doctrine Does Not Require Defendant Z to Have Minimal Contacts With New York State

This Court is cognizant that its use of the "closely related" doctrine in the context of a motion to dismiss for lack of personal jurisdiction implicates the concerns of some courts regarding the constitutionality of imposing personal jurisdiction on a non-signatory with no minimal contacts in the forum state. *See Mersen USA,* 2022 WL 902372, at *10; *Arcadia* 356 F.Supp.3d at 395. The "closely related" doctrine has roots in *Aguas*, which, as the *Mersen USA* and *Arcadia* courts noted, was decided under the principle of forum non conveniens, not personal jurisdiction. *Fasano*, too, was decided under the "closely related" doctrine and in the context of forum non conveniens as opposed to personal jurisdiction. Select lower courts in other circuits have raised similar concerns that the doctrine is in tension with the Supreme Court's minimum contacts requirements. *Fitness Together Franchise, LLC* v. *EM Fitness, LLC,* No. 1:20-cv-02757-DDD-STV, 2020 WL 6119470, at *5 (D.Colo. Oct. 16, 2020).

However, as Defendant Z admits (Def. Br. at 8), in other cases, including a recent and well-reasoned decision in the Fifth Circuit, courts *have* found it appropriate to bind non-signatory defendants subject to contractual forum selection clauses under the "closely related" doctrine in the context of a motion to dismiss for lack of personal jurisdiction. *Franklink Inc.,* 50 F.4th at 441-43. The Fifth Circuit acknowledged in *Franklink Inc.* the percolating legal theory that due process concerns should deter application of the "closely related" doctrine in the personal jurisdiction context, and the fact that the "closely related" has admittedly "vague standards." *Id.* at 440. This Court should concur with the Fifth Circuit's findings that the Third and Seventh Circuits have provided more clarification and explanation of the theory than other circuits. *Id.* at 439. Ultimately, the Fifth Circuit found that the doctrine has been sufficiently scrutinized. *Id.* at 441. In explaining its decision not to apply a minimal contacts requirement, the Fifth Circuit noted that the "closely related" doctrine "has been recognized by all other circuits to have considered it" and as such it was loath to create a circuit split, particularly when the doctrine could "serve a purpose in producing equitable results." *Id.* While not bound by the Fifth Circuit, this Court should find its argument persuasive that "prudence and judicial modesty caution against singularly swimming against this tide of authority." *Id.* The Second Circuit

has not spoken on this issue specifically or particularly clearly—*Fasano* was decided in the context of forum non conveniens—and until the Second Circuit does speak, the *Aguas* line supports a tailored application of the "closely related" doctrine, even on a motion to dismiss for lack of personal jurisdiction.

B. Failure to State a Claim

Defendant Z also moves the Court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Plaintiff's claims against it for failure to state a claim. Defendant Z argues that Plaintiff's claims should be dismissed because Defendant is a non-signatory to the License Agreement that "is the foundation of [Plaintiff]'s case" (Def. Br. at 13). For the reasons outlined below, the Court should deny Defendant Z's motion to dismiss.

1. Applicable Law

To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (omitting internal citations). The Court should grant dismissal pursuant to Rule 12(b)(6) only where the complaint cannot state any set of facts that would entitle the plaintiff to relief." *Hertz Corp.* v. *City of N.Y.*, 1 F.3d 121, 125 (2d Cir. 1993). In determining the viability of Plaintiff's claims, the Court must accept as true all well-pleaded factual allegations in the complaint. *Id.* at 678. Additionally, the Court may consider not only the complaint itself, but also documents attached to the complaint as exhibits, any statements or documents incorporated by reference in the complaint, and documents that are "integral" to the complaint even if they are not incorporated by reference. *See Chambers* v. *Time Warner, Inc.,* 282 F.3d 147, 152-53 (2d Cir. 2002); *see generally Goel* v. *Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016) (discussing materials that may properly be considered in resolving a motion brought under Fed. R. Civ. P. 12(b)(6), explaining that "[a] document is integral to the complaint 'where the complaint relies heavily upon its terms and effect,'" which often involves "a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls"). However, "although a court must accept as true all of the allegations contained in a complaint, that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Harris* v. *Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (internal quotation marks, alterations, and citations omitted); *see also Rolon* v. *Henneman*, 517 F.3d 140, 149 (2d Cir. 2008) (explaining that a court need not accept "conclusory allegations or legal conclusions masquerading as factual conclusions").

2. Failure to State a Claim Discussion

Defendant Z asserts that "even if [it] were subject to jurisdiction in New York, [Plaintiff]'s claims against it should be dismissed because it is not a party to the agreement that is the foundation of [Plaintiff]'s case." (Def. Br. at 13). Plaintiff argues that Defendant Z "has assumed the role of Defendant Y in connection with the Agreement" and that Defendant Z, not Defendant Y, worked with Plaintiff after Defendant Z's acquisition of Defendant Y in September 2022. (Pl. Opp. at 9). Moreover, Plaintiff claims that Defendant Z, not Defendant Y, "purported to terminate the Agreement" which, it alleges, is the "breaching" action that led to the damages Plaintiff asserts. *Id.*

For substantially the same reasons identified in its consideration of the License Agreement's forum-selection clause, the Court should find that Plaintiff adequately pleads facts sufficient to support that Defendant Z so completely acquired Defendant Y's assets and took over its operations as to become Defendant Y's successor, sufficiently "closely related" to be bound to the contract despite being a non-signatory. As discussed below, the Court should also find that Plaintiff has adequately plead breach of contract and anticipatory breach of contract.

a. The Complaint Adequately Pleads a Breach of Contract

Under New York law, a claim for breach of contract must allege: "[i] the existence of an agreement, [ii] adequate performance of the contract by the plaintiff, [iii] breach of contract by the defendant, and [iv] damages." *Harsco Corp.* v. *Segui*, 91 F.3d 337, 348 (2d Cir. 1996). "In pleading these elements, a plaintiff must identify what provisions of the contract were breached as a result of the acts at issues." *Wolff* v. *Rare Medium, Inc.*,171 F.Supp.2d 354, 358 (S.D.N.Y. 2001). Accepting as true all well-pleaded factual allegations in the complaint as the Court must, the Court should find that Plaintiff has plead sufficient facts to allege its own adequate performance of the License Agreement.

The existence of the License Agreement is clear and the fact that Defendant Z is bound to it has been settled above and thus satisfies the first element of breach.

Plaintiff sufficiently alleged both its own adequate performance—satisfying the second element—and damages that it suffered—satisfying the fourth element of breach. Plaintiff stated that in reliance on the assurances of first Defendant Y and later Defendant Z, it continued its efforts under the License Agreement between July 2021 (when Defendants first began negotiating their transaction) until the end of December 2021 (when Plaintiff was at last informed of Defendant Z's consideration of a plan to terminate the Agreement), and that this effort amounted to more than one million dollars in investments in inventory and related expenses, advertising, marketing, and development. (Compl. at §§ 36-40). Plaintiff further alleges that it has suffered damages in an amount significantly higher than one million dollars, estimating the damages to exceed $35 million. (Compl. at § 55).

A determination of the remaining element of breach depends on an accurate reading of the License Agreement at issue. If, as Plaintiff alleges, Defendant's termination of the License Agreement constitutes a breach, then all elements of breach of contract have been satisfied.

Plaintiff alleges that Defendant Z's termination of the License Agreement was not authorized for multiple reasons: its interpretation of the Change of Control provision (Pl. Opp. Ex. B at § 9(f)), its interpretation of the Force Majeure provision (Pl. Opp. Ex. B at § 14), and its understanding that Defendant Y waived any potential justification based on sales targets in its communications with Plaintiff in late 2020.

The License Agreement between Plaintiff and Defendant Y provides that the initial term of the Agreement was to end on December 31, 2027 after which the Agreement would automatically renew for terms of one year unless terminated in accordance with the Agreement. (Pl. Opp. Ex. B at § 9(a)). What Plaintiff describes as the Change of Control Provision states:

> A party may terminate this Agreement upon written notice to the other party if (i) insolvency, bankruptcy, or similar proceedings are instituted by or against such party, (ii) there is any assignment or attempted assignment by such party for the benefit of creditors, (iii) there is any appointment, or application of such appointment of a receiver for such party; or (iv) there is a sale or transfer of all or substantially all of the assets, or a merger or consolidation of such party, or a transfer of ownership that results in a change of voting control of such party.

(Pl. Opp. Ex. B at § 9(f)). Plaintiff invokes the most recent antecedent grammatical canon, and provides compelling examples as to why any alternative to reading the provision as protecting the non-changing party (as opposed to the party experiencing the change of control) would result in absurd outcomes. Plaintiff's reading of the provision is the best reading. Further, accepting as true Plaintiff's factual allegations as to its communications with Defendants and the shipping difficulties it experienced, the Agreement's Force Majeure provision supports Plaintiff's assertion that Defendant's attempted termination of the Agreement was unauthorized and constitutes breach. (Pl. Opp. Ex. B at §§ 14; 9).

In sum, Plaintiff sufficiently alleged (i) the existence of an agreement, (ii) its own adequate performance of the contract, (iii) breach of contract by Defendant Z, and (iv) resulting damages. Thus, the Court should find that Complaint adequately pleads a breach of contract.

b. The Complaint Adequately Pleads Anticipatory Breach of Contract

As to Plaintiff's claim of anticipatory breach, "[a]nticipatory repudiation occurs when, before the time for performance has arisen, a party to a contract declares his intention not to fulfill a contractual duty." *Lucente* v. *Int'l Bus. Machines Corp.*, 310 F.3d 243, 258 (2d Cir. 2002). Anticipatory repudiation "can be either a statement by the obligor to the oblige indicating that the obligor will commit a breach that would itself give the oblige a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." *Princes Point LLC* v. *Muss. Dev. L.L.C.,* 30 N.Y.3d 127, 133, 87 N.E.3d 121 (2017) (quoting *Norcon Power Partners* v. *Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 463, 682 N.Y.S.d2 664, 705 N.E.2d 656 (1998)). "For an anticipatory repudiation to be deemed to have occurred, the expression of intent not to perform by the repudiator must be 'positive and unequivocal.'" *Princes Point LLC*, 30 N.Y.3d at 133 (quoting *Tenavision, Inc.* v. *Neuman*, 45 N.Y.2d 145, 150 (1978)). When confronted with an anticipatory repudiation, the non-repudiating party has two mutually exclusive options. It may either (i) "elect to treat the repudiation as an anticipatory breach and seek damages for breach of contract, thereby terminating the contractual relation between the parties," or (ii) "continue to treat the contract as valid and await the designated time for performance before bringing suit." *Lucente*, 310 F.3d at 258.

Plaintiff obviously has opted for the latter. (Compl. § 41) (stating that "[n]otwithstanding [Defendant's breach], [Plaintiff] continued performing its obligations under the Agreement . . . ."). As for a positive and unequivocal expression of intent not to perform by the repudiator, it is difficult to imagine a more unequivocal expression of intent not to perform than if Defendant, as alleged, informed Plaintiff of its intent to terminate i.e. cease compliance with the Agreement and follow through in announcing it has done so. (Compl. § 40; 42). As such, Plaintiff has adequately pleaded anticipatory repudiation of contract.

Applicant Details

First Name	**Brynn**
Middle Initial	**M**
Last Name	**Morse**
Citizenship Status	**U. S. Citizen**
Email Address	**brynn.m.morse@gmail.com**
Address	**Address** Street **12013 Johns Road** City **Anchorage** State/Territory **Alaska** Zip **99515** Country **United States**
Contact Phone Number	**9078309768**

Applicant Education

BA/BS From	**University of Alaska-Anchorage**
Date of BA/BS	**May 2020**
JD/LLB From	**New England Law | Boston** **https://www.nesl.edu/**
Date of JD/LLB	**May 19, 2023**
Class Rank	**5%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Pace Environmental Moot Court (2022 and 2023)** **Saul Lefkowitz Trademark and Unfair Competition Moot Court (2023)**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Welch, Richard
curzonmill@aol.com
Ditkoff, Joseph
joseph.ditkoff@jud.state.ma.us
617-994-4185
Lyness, Sean
slyness@nesl.edu

References

The Honorable Donald L. Cabell
United States Magistrate Judge
District of Massachusetts
(617) 748-9229
honorable_donald_cabell@mad.uscourts.gov
Supervisor for Spring 2023 Internship

Andrew S. Doherty
Assistant District Attorney, Appeals Division
Suffolk County District Attorney's Office
(617) 619-4000
andrew.doherty@mass.gov
Supervisor for Summer 2022 Internship

The Honorable Dani R. Crosby
Superior Court Judge
Alaska Superior Court
(907) 306-8600
dcrosby@akcourts.gov
Supervisor for Summer 2021 Internship

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Brynn M. Morse
brynn.m.morse@gmail.com • 907-830-9768

The Honorable Morgan B. Christen
United States Court of Appeals for the Ninth Circuit
605 W 4th Avenue, Suite 252
Anchorage, AK 99501

June 20, 2023

Dear Judge Christen:

I am a 2023 graduate from New England Law | Boston and am writing to apply for a 2025-26 clerkship in your chambers. I have accepted a clerkship for 2023-24, and I intend to accept another clerkship or an assistant public defender position for 2024-25. I am available for either your June or August start date.

My prior legal experience has prepared me to be an excellent law clerk. As a four-time judicial intern, I drafted more than twenty decisions, including published appellate court opinions. I learned the technical skills required of a clerk, including meticulous research, cite checking, and editing, as well as adapting my writing to the judge's voice.

I am specifically well qualified to be your law clerk. I understand that you have your clerks argue the parties' positions as part of your oral argument preparation. I have participated in debate from my freshman year at East Anchorage High School through my final year of law school, and I appreciate the value of taking a position that I disagree with to explore the merits of an argument.

Attached please find my resume, law school and undergraduate transcripts, and writing sample, as well as letters of recommendation from Justice Joseph Ditkoff, with whom I interned (and will clerk 2023-24), Judge Richard Welch, my Federal Courts instructor, and Professor Sean Lyness, my Environmental Moot Court coach. Additionally, I listed three of my former employers as references.

Thank you for considering me for a clerkship in your chambers. I plan to be in Anchorage for a few weeks in August, and I would prefer to interview in person during that time, but I am available to interview anytime.

Sincerely,

Brynn M. Morse

Brynn M. Morse

brynn.m.morse@gmail.com • 907-830-9768

EDUCATION

New England Law | Boston — Boston, MA
Juris Doctor, magna cum laude — May 2023
GPA: 3.78/4.0
Class Rank: 12/264
Honors: Sandra Day O'Connor Scholarship recipient; Dean's List; New England Scholar; CALI Awards in Wrongful Convictions and Domestic Violence
Activities: International Law Student Negotiation Competition July 2023; National ABA Negotiations Competition Finalist 2023; Environmental Moot Court Quarterfinalist 2023; Trademark and Unfair Competition Moot Court Team 2023; Environmental Moot Court Team 2022; Debate Club Founder/President 2020 –2023

University of Alaska Anchorage — Anchorage, AK
Bachelor of Science in Mathematics — May 2020

LEGAL EXPERIENCE

Massachusetts Appeals Court — Boston, MA
Law Clerk for The Honorable Joseph M. Ditkoff — Aug. 2023 – Aug. 2024
• Accepted 2023-24 clerkship

United States District Court — Boston, MA
Judicial Intern for The Honorable Donald L. Cabell — Jan. 2023 – May 2023
• Drafted orders and a bench memorandum
• Edited and cite checked orders; conducted legal research; attended mediations and court hearings

Massachusetts Supreme Judicial Court — Boston, MA
Judicial Intern for The Honorable Dalila A. Wendlandt — Aug. 2022 – Nov. 2022
• Drafted memoranda summarizing applications for further appellate review and part of a bench memorandum
• Edited and cite checked opinions and bench memoranda; conducted legal research, including fifty-state survey

Suffolk County District Attorney's Office — Boston, MA
Legal Intern, Appeals Division — June 2022 – Aug. 2022
• Argued case before Appeals Court (see 9:26-17:42 at https://www.youtube.com/watch?v=YgPOkqDdM3U)
• Wrote appellate briefs, motions and oppositions for interlocutory appeals, and trial motions
• Advised on whether to appeal adverse trial court decisions

Massachusetts Appeals Court — Boston, MA
Judicial Intern for The Honorable Joseph M. Ditkoff — Jan. 2022 – May 2022
• Drafted two published opinions and four unpublished decisions
• Read and discussed case briefs and materials for all cases

Alaska Superior Court — Anchorage, AK
Judicial Intern for The Honorable Dani R. Crosby — May 2021 – Aug. 2021
• Drafted orders and bench memoranda
• Assisted with in camera reviews; conducted broad legal research; summarized case materials to prepare Judge Crosby for hearings

VOLUNTEER AND PROFESSIONAL EXPERIENCE

Alaska Juvenile Justice Advisory Committee — Oct. 2019 – Present
Mock Trial Team Coach (Anchorage Youth Court, UAF, Dimond High School) — March 2020 – March 2023
Anchorage Youth Court, Attorney and Judge — Aug. 2014 – Aug. 2019
Intern for The Honorable Lisa A. Murkowski — July 2018 – Aug. 2018
United States Senate Page — Sept. 2017 – Jan. 2018

New England Law | Boston

UNOFFICIAL TRANSCRIPT

Grades for Brynn M. Morse (as of 6/5/2023 23:10:56)

Division: D

Class Rank: 12 out of 266

Total Credits: 90.00

Cumulative GPA: 3.78

Course Term	Course Number	Course Name	Credits	Grade	Points
Academic Year 2020- 2021 : Fall	CT-100-D-01	CONTRACTS I	2.00	A-	7.50
Academic Year 2020- 2021 : Fall	CV-104-D-01	CIVIL PROCEDURE	4.00	A	16.00
Academic Year 2020- 2021 : Fall	LR-100-T-13	LEGAL RESEARCH & WRITING	2.00	B+	7.00
Academic Year 2020- 2021 : Fall	PR-100-D-01	PROPERTY I	3.00	A	12.00
Academic Year 2020- 2021 : Fall	TO-101-D-01	TORTS	4.00	B+	14.00
Academic Year 2020- 2021 : Spring	CL-200-D-01	CRIMINAL LAW	3.00	B+	10.50
Academic Year 2020- 2021 : Spring	CN-100-D-01	CONSTITUTIONAL LAW	4.00	B	12.00
Academic Year 2020- 2021 : Spring	CT-101-D-01	CONTRACTS II	3.00	A	12.00
Academic Year 2020- 2021 : Spring	LR-101-T-13	LEGAL RESEARCH & WRITING	2.00	A	8.00
Academic Year 2020- 2021 : Spring	PR-101-D-01	PROPERTY II	2.00	A-	7.50
Academic Year 2021- 2022 : Fall	BO-327-D-01	BUSINESS ORGANIZATIONS	3.00	BB+	9.75
Academic Year 2021- 2022 : Fall	CT-499-D-03	CONTRACT DRAFTING	2.00	A-	7.50
Academic Year 2021- 2022 : Fall	EV-200-D-03	EVIDENCE	3.00	A	12.00
Academic Year 2021- 2022 : Fall	LR-200-D-10	LEGAL RESEARCH & WRITING	2.00	BB+	6.50
Academic Year 2021- 2022 : Fall	PS-199-T-01	PERSPECTIVES: APPELLATE P	2.00	A	8.00
Academic Year 2021- 2022 : Fall	WE-556-D-01	WILLS, ESTATES, AND TRUSTS	3.00	B	9.00
Academic Year 2021- 2022 : Spring	CP-200-D-01	CRIMINAL PROCEDURE	3.00	A-	11.25
Academic Year 2021- 2022 : Spring	FC-379-T-01	FEDERAL COURTS	3.00	A	12.00
Academic Year 2021- 2022 : Spring	JC-900-D-03	HONORS JUDICIAL INTERNSHI	3.00	A	12.00
Academic Year 2021- 2022 : Spring	NL-450-D-01	NATIONAL LAWYERING SKILLS	1.00	P	0.00
Academic Year 2021- 2022 : Spring	PF-200-D-03	LAW & ETHICS OF LAWYERING	3.00	A	12.00
Academic Year 2021- 2022 : Spring	TP-540-T-01	TRIAL PRACTICE	3.00	A	12.00
Academic Year 2022-2023 : Fall	AC-900-D-02	ADVANCED CLINIC- HONORS J	1.00	A	4.00
Academic Year 2022-2023 : Fall	CA-302-D-01	CRIMINAL ADVOCACY	3.00	A-	11.25
Academic Year 2022-2023 : Fall	DV-466-E-01	DOMESTIC VIOLENCE	2.00	A	8.00
Academic Year 2022-2023 : Fall	ED-362-D-01	ELECTRONIC DISC. & DIGITAL	2.00	A	8.00
Academic Year 2022-2023 : Fall	MR-451-E-01	REMEDIES	3.00	A-	11.25
Academic Year 2022-2023 : Fall	WR-687-D-01	WRONGFUL CONVICTIONS	2.00	A	8.00
Academic Year 2022-2023 : Fall	WT-410-T-01	WHITE COLLAR CRIME	2.00	A	8.00
Academic Year 2022-2023 : Spring	AL-842-E-01	ADVANCED LEGAL ANALYSIS	3.00	A	12.00
Academic Year 2022-2023 : Spring	EV-388-T-01	EVIDENCE AND ADVOCACY	2.00	A	8.00
Academic Year 2022-2023 : Spring	FC-900-D-03	FEDERAL COURTS CLINIC	3.00	A	12.00
Academic Year 2022-2023 : Spring	IN-461-T-01	CYBER LAW	2.00	A	8.00
Academic Year 2022-2023 : Spring	NL-450-D-01	NATIONAL LAWYERING SKILLS	1.00	P	0.00
Academic Year 2022-2023 : Spring	PS-333-D-01	PS: CIVIL LITIGATION CAPSTOI	2.00	A	8.00

New England Law | Boston

UNOFFICIAL TRANSCRIPT

Grades for Brynn M. Morse (as of 6/5/2023 23:10:56)

Division: D

Class Rank: 12 out of 266

Total Credits: 90.00

Cumulative GPA: 3.78

Course Term	Course Number	Course Name	Credits	Grade	Points
Academic Year 2022-2023 : Spring	PS-369-D-01	PERSP: ENVIRONMENTAL LITI(	2.00	A	8.00

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University of Alaska UNOFFICIAL Transcript

31180928 Brynn Morse
Jun 18, 2022 06:14 am

Courses which are in progress may also be included on this transcript.

Print

Transfer Credit Institution Credit Transcript Totals

Transcript Data
STUDENT INFORMATION

Name : Brynn Morse
Curriculum Information

Non-Degree
College: UAA General Education
Major: Inactivated Program

This is NOT an Official Transcript

DEGREES AWARDED:

Bachelor's Awarded: Bachelor of Science **Degree Date:** May 03, 2020
Curriculum Information

Major: Mathematics

TRANSFER CREDIT ACCEPTED BY INSTITUTION -Top-

SU17 - SU18: CEEB Advanced Placement

Subj	Course	Title	Grade	Credit Hours	Quality Points	R
BIOL	A1	Departmental Elective	P	4.000	0.00	
BIOL	A102	*Introductory Biology	P	3.000	0.00	
BIOL	A103	*Introductory Biol Lab	P	1.000	0.00	
ECON	A201	*Prin Of Macroeconomics	P	3.000	0.00	
ENGL	A121	*Introduction to Literature	P	3.000	0.00	
HIST	A131	*History of United	P	3.000	0.00	

		States I				
HIST	A132	*History of United States II	P	3.000		0.00
MATH	A251	*Calculus I	P	4.000		0.00
MATH	A252	*Calculus II	P	4.000		0.00
PHYS	A1NS	*Gen Ed Rqmt: Nat Sci Lec/Lab	P	4.000		0.00
PS	A101	*Intro to American Government	P	3.000		0.00
PS	A1S	*Gen Ed Rqmt: Soc Sci	P	3.000		0.00
STAT	A252	*Elementary Statistics	P	3.000		0.00
WRTG	A111	*Writing Across Contexts	P	3.000		0.00

	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	44.000	0.000	0.00	0.00

SU17: DSST Exam 000

Subj	Course	Title	Grade	Credit Hours	Quality Points	R
WRTG	A1	Departmental Elective	P	3.000		0.00

	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	3.000	0.000	0.00	0.00

INSTITUTION CREDIT -Top-

Term: Spring Semester 2018

College: UAA General Education

Major: Non-Degree Seeking

Academic Standing:

Campus	Subj	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
UAA - Anchorage Campus	COMM	A241	UA	*Public Speaking	A	3.000	12.00		
UAA - Anchorage Campus	MATH	A265	UA	Fundamentals of Mathematics	C	3.000	6.00		
UAA - Anchorage Campus	MATH	A302	UA	Ordinary Differential Eqns	W	(3.000)	0.00		
UAA - Anchorage Campus	MATH	A314	UA	Linear Algebra	B	3.000	9.00		
UAA - Anchorage	PHIL	A212	UA	*Early Modern Philosophy	A	3.000	12.00		

Campus							
UAA – Anchorage Campus	STAT	A307	UA	*Probability & Statistics	C	4.000	8.00

Term Totals (Undergraduate - UAA)

	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	47.00	2.93
Cumulative:	16.000	16.000	47.00	2.93

Term: Summer Semester 2018

College: UAA College of Arts & Sciences
Major: Mathematics
Academic Standing: Good Standing

Campus	Subj	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
UAA – Anchorage Campus	MATH	A302	UA	Ordinary Differential Eqns	C	3.000	6.00		
UAA – Matanuska Susitna	PHIL	A211	UA	*Ancient & Medieval Philosophy	A	3.000	12.00		
UAA – Anchorage Campus	PHIL	A302	UA	Biomedical Ethics	A	3.000	12.00		
UAA – Anchorage Campus	PHIL	A303	UA	Environmental Ethics	B	3.000	9.00		
UAA – Anchorage Campus	THR	A111	UA	*Theatre Appreciation	B	3.000	9.00		

Term Totals (Undergraduate - UAA)

	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	48.00	3.20
Cumulative:	31.000	31.000	95.00	3.06

Term: Fall Semester 2018

College: UAA College of Arts & Sciences
Major: Mathematics
Academic Standing: Good Standing

Campus	Subj	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
UAA – Anchorage Campus	MATH	A306	UA	Discrete Methods	A	3.000	12.00		
UAA – Anchorage Campus	MATH	A324	UA	Intro to Real Analysis	C	3.000	6.00		
UAA – Anchorage Campus	MATH	A410	UA	Intro to Complex Analysis	D	3.000	3.00		
UAA –	MATH	A420	UA	*Historical Mathematics	C				

Anchorage Campus							3.000	6.00	

Term Totals (Undergraduate - UAA)

	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	27.00	2.25
Cumulative:	43.000	43.000	122.00	2.83

Term: Spring Semester 2019

College: UAA College of Arts & Sciences

Major: Mathematics

Academic Standing: Academic Warning

Campus	Subj	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
UAA - Anchorage Campus	ANTH	A202	UA	*Cultural Anthropology	A	3.000	12.00		
UAA - Anchorage Campus	MATH	A253	UA	*Calculus III	F	(4.000)	0.00		E
UAA - Anchorage Campus	MATH	A303	UA	Intro to Abstract Algebra	F	(3.000)	0.00		E
UAA - Anchorage Campus	MATH	A305	UA	Introduction to Geometries	C	3.000	6.00		
UAA - Anchorage Campus	MATH	A431	UA	Intro to Differential Geometry	D	3.000	3.00		
UAA - Anchorage Campus	PHYS	A211	UA	*General Physics I	C	3.000	6.00		
UAA - Anchorage Campus	PHYS	A211R	UA	Gen Physics I Problem Solving	P	0.000	0.00		

Term Totals (Undergraduate - UAA)

	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	27.00	2.25
Cumulative:	55.000	55.000	149.00	2.70

Term: Summer Semester 2019

College: UAA College of Arts & Sciences

Major: Mathematics

Academic Standing: Academic Warning

Campus	Subj	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
UAA - Anchorage Campus	BIOL	A111	UA	*Human Anatomy & Physiology I	D	4.000	4.00		
UAA - Anchorage	BIOL	A111L	UA	Human Anat & Phys I Lab	NG	0.000	0.00		

Campus							
UAA – Anchorage Campus	PS	A345	UA	Alaska Gov't & Politics	NB	(3.000)	0.00
UAA – Anchorage Campus	PS	A353	UA	American Political Development	F	(3.000)	0.00

Term Totals (Undergraduate - UAA)

	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	4.000	7.000	4.00	0.57
Cumulative:	59.000	62.000	153.00	2.46

Term: Fall Semester 2019

College: UAA College of Arts & Sciences

Major: Mathematics

Academic Standing: Good Standing

Campus	Subj	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
UAA – Anchorage Campus	CA	A490	UA	Fondant Modeling & Sugar Flwrs	B	1.000	3.00		
UAA – Anchorage Campus	MATH	A253	UA	*Calculus III	B	4.000	12.00		I
UAA – Anchorage Campus	PHIL	A406	UA	Philosophy of Law	A	3.000	12.00		
UAA – Anchorage Campus	WRTG	A213	UA	*Writing & the Sciences	C	3.000	6.00		

Term Totals (Undergraduate - UAA)

	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	11.000	11.000	33.00	3.00
Cumulative:	70.000	73.000	186.00	2.54

Term: Spring Semester 2020

College: UAA College of Arts & Sciences

Major: Mathematics

Academic Standing: Good Standing

Campus	Subj	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
UAA – Anchorage Campus	MATH	A303	UA	Intro to Abstract Algebra	C	3.000	6.00		I
UAA – Anchorage Campus	MATH	A309	UA	Intro to Number Theory	C	3.000	6.00		

Term Totals (Undergraduate - UAA)

	Earned Hours	GPA Hours	Quality Points	GPA

Current Term:	6.000	6.000	12.00	2.00
Cumulative:	76.000	79.000	198.00	2.50

TRANSCRIPT TOTALS (UNDERGRADUATE - UAA) -Top-

	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	76.000	79.000	198.00	2.50
Total Transfer:	47.000	0.000	0.00	0.00
Overall:	123.000	79.000	198.00	2.50

RELEASE: 8.7.1

COMMONWEALTH OF MASSACHUSETTS
THE APPEALS COURT
BOSTON 02108

JOSEPH M. DITKOFF
ASSOCIATE JUSTICE

June 21, 2023

The Hon. Morgan B. Christen
Judge for the United States Court of Appeals for the Ninth Circuit
605 West 4th Avenue
Suite 252
Anchorage, AK 99501

Dear Judge Christen:

I am pleased to recommend Brynn Morse to you to be a law clerk, after she has finished her duties as my law clerk.

Brynn came to me through an old friend, Lynn Muster. Brynn was Professor Muster's best student in her research and writing class, and Professor Muster suggested that I hire her as an intern for Spring 2022. After interviewing her and watching her simulated oral argument (excellent) before Professor Muster and two of my colleagues, I hired her as an intern.

In my chambers, both my law clerk and my intern are expected to read the briefs for the oral argument cases (usually twelve per month) and come prepared to discuss them with recommendations for disposition. During Brynn's internship, we also discussed two major COVID-related single justice emergency matters that I heard. The first concerned the legality of the statewide public school mask mandate, and the second concerned the legality of Boston's eviction moratorium. In fact, Brynn took the lead in advising me and assisting me with the writing on the eviction moratorium matter, as my law clerk was recused.

The main duty of both my law clerk and my intern, however, is to draft unpublished decisions and published opinions. The previous record for one of my part-time interns was drafting two decisions and one published opinion — impressive enough that I hired that intern as my law clerk for this year (where she has excelled). Brynn came to me with the quixotic goal of writing six decisions for me.

I saw no reason to make this preposterous goal easy. I started Brynn off with the hardest sort of case we have in the Massachusetts Appeals Court: an appeal of a decree terminating parental rights. Because of the stakes and urgency, these cases are a priority and must result in published opinion-quality decisions. One month in, Brynn had produced an excellent draft, the biggest edit to which was the addition of a footnote.

Heartened by this initial success, I gave Brynn a published restraining order case to write. Two weeks later I had a draft. This one required a little more work — as published opinions tend to do — but it was a very good draft that I could turn around in short order. See *Yasmin Y.*

v. Queshon Q., 101 Mass. App. Ct. 252 (2022). Meanwhile, Brynn was distinguishing herself in the discussion of cases for oral argument.

I then gave Brynn two unpublished criminal cases to write, as she has a primary interest in criminal law. One was a four-issue child pornography possession case that required us to view the child pornography to assess the rejection of a proposed stipulation to the nature of the images. The other was a three-issue burglary case. I received both drafts by the beginning of April. Both were excellent and required minor editing. Four down, but finals were fast approaching.

At this point, Brynn essentially forfeited the game by asking for the assignment of a published opinion in an administrative law case involving prisoner grievances, a matter barely touched in our case law. I saw no way that she could possibly finish this and another case before her internship ended.

Brynn, however, had one more card to play. She drafted a decision in a four-issue sex trafficking criminal case before oral argument. A brilliant play, but futile — oral argument took an unexpected turn, and the draft was instantly obsolete. By the end of the day after oral argument, however, I received a new draft that addressed the way the case had played out at argument and at semble and could be turned around with minimal edits.

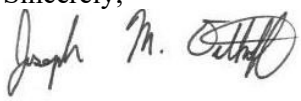
And the administrative law case? I received that after Brynn's law school examinations, before she started her summer internship at the Suffolk County (Boston) District Attorney's Office's Appellate Division. See *Sullivan v. Superintendent, Mass. Correctional Inst.-Shirley*, 101 Mass. App. Ct. 766 (2022). Six drafts for a part-time intern.

As this tale reflects (beyond the upper limit of how exciting one can make appellate decision writing sound), Brynn is talented and extraordinarily driven. She graduated from high school and college in five combined years, while spending time working in the United States Senate, and then went directly to law school. She's essentially an unstoppable writing machine and any judge who hires her should expect requests for additional assignments beyond Brynn's share of the case load.

Furthermore, Brynn's contributions in discussing oral argument cases were consistently insightful, largely in accord with my thoughts but often providing additional dimensions or facts to inform my decision making. On a personal level, she is unquestionably young. But she is pleasant, highly respectful, and greatly appreciative of feedback. She shows a lamentable disinterest in major league baseball, perhaps born of growing up two thousand miles from the nearest MLB ballpark, but nobody is perfect.

I am confident enough that Brynn will make an excellent law clerk that I hired her myself as my law clerk for 2023-2024. As I am a former federal circuit judge law clerk myself, I will train Brynn in the skills necessary for clerking for a circuit judge. I have particularly urged her to return to Alaska after her clerkship with me, and I am pleased to see her applying to a judge in her hometown, especially one who was a judge on a state appellate court. Nonetheless, any judge will enjoy having her as a law clerk and will be proud to have helped shape her career. Please feel free to call me at 617.851.6983 if you have any questions.

Sincerely,



Joseph M. Ditkoff

June 20, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I am writing to recommend my student Brynn M. Morse for a judicial clerkship in your chambers. I had the pleasure of having Brynn in my 100-student Civil Procedure class in fall 2020. She came to class—online or in person—prepared, ready to discuss, and committed to engaging with the material. From an instructor's point of view, she was the ideal student.

Her classroom performance was only matched by her exam performance. She had the highest score on the multiple-choice portion of the exam and one of the highest scores on the essay portion of the exam. This netted her an "A" in my class, something that is exceedingly hard to obtain in light of the law school curve.

And my class is by no means an outlier; she has excelled in her other classes as well. She is an exceptionally promising attorney; her success in law school is a testament to that.

On a personal note, Brynn has come to my office hours several times over the years to chat about classwork and the legal field more generally. I also coached her on the Environmental Moot Court team. She is a pleasure to talk to, a hard worker, and a consummate professional. I will certainly miss having her as a student.

I can voice with full confidence my support for her as a judicial clerk in your chambers. I am sure she will be an asset.

Please feel free to contact me if you have any questions.

Sincerely,

Sean Lyness

Visiting Assistant Professor of Law

New England Law Boston

SLyness@nesl.edu

WRITING SAMPLE INTRODUCTION

This writing sample is an excerpt from an appellee brief for the Commonwealth. Portions of the brief have been removed and replaced with the information in brackets. Although the record is not attached, the record citations remain in the brief to demonstrate that citations were properly included.

ISSUES PRESENTED

I. Whether the admission of evidence related to the defendant's marijuana intoxication was proper where the evidence could properly be considered for the intoxication element of the defendant's OUI intoxicating liquor charge.

II. Whether the admission of a police officer's statement that the defendant was impaired by marijuana was prejudicial error where the jury found that the defendant was not impaired by marijuana.

STATEMENT OF THE CASE

[The defendant appeals from his conviction of operating a motor vehicle under the influence (OUI) of intoxicating liquor, second offense, G. L. c. 90,

§ 24 (1) (a) (1) (DA. 3).[1] The defendant was acquitted of a marked lane violation, G. L. c. 89, § 4A; and OUI drugs, G. L. c. 90, § 24 (1) (a) (1) (DA. 3).]

STATEMENT OF FACTS

Early Saturday morning on February 27, 2016, around 2:30 A.M., a state police trooper responded to an accident on Soldier Field Road in Brighton (DA. 3; CA. 3; Tr. I:4-7).[2] The trooper observed a Mercedes-Benz and a Black Chevy Cruze, each with minor to medium damage (Tr. I:8, 13-14). The Mercedes-Benz's driver was standing in the breakdown lane, and the defendant, the driver of the Black Chevy Cruze, was standing in the first travel lane (Tr. I:8).

The trooper approached the drivers and asked if they were injured. The Mercedes-Benz's driver said that

[1] References to the defendant's brief will be cited as (D.Br. __); references to his appendix will be cited as (DA. __); references to the Commonwealth's appendix will be cited as (CA. __); references to the two numbered transcript volumes will be cited as (Tr. __:__); and references to the jury instructions will be cited as (Tr. JI:__).

[2] At trial, the prosecutor mistakenly referred to February 8th, a Monday, instead of February 27th (Tr. I:6). The complaint clearly lists the date of offense as February 27th (CA. 3), and the officer testified that the offense occurred on a Saturday (Tr. I:7).

he was not injured while the defendant just stared at the trooper with a dazed look (Tr. I:9). The trooper guided the defendant out of the travel lane and twice more asked him whether he was injured (Tr. I:9). Both times, the defendant said that he was not injured (Tr. I:9).

After the trooper asked the drivers to return to their vehicles, the trooper again had to guide the defendant out of the travel lane (Tr. I:9-10). Because the Black Chevy Cruze was a rental, the trooper asked the defendant for the rental papers, but the defendant handed over rental papers for a different vehicle (Tr. I:10-11).

The trooper asked the defendant a series of questions, most but not all of which the defendant answered appropriately (Tr. I:16). The defendant admitted that he had drunk two beers but could not remember the brand of beer he had consumed; stated that his home in Medfield was close, despite it being about twenty miles away; and believed it was around 12:30-1 A.M. when it was actually close to 2:30 A.M. (Tr. I:15-16, 24). Additionally, he initially denied having taken any medication, but he later stated that he had taken

his medically prescribed marijuana that morning (Tr. I:21-22).[3]

Throughout the trooper's interactions with the defendant, the trooper smelled strong odors of alcohol and marijuana (Tr. I:11, 15, 22, 30-32, 36). The trooper also observed the defendant's slack, droopy facial expression; bloodshot, glassy eyes; red, abraded eye rims; and thick speech (Tr. I:15, 22-23).

The trooper decided to conduct field sobriety tests (Tr. 19). The defendant stepped out of his car, and immediately went, once again, into the travel lane (Tr. I:17). The trooper directed the defendant back to the breakdown lane (Tr. I:17).

The trooper instructed the defendant on three tests. As the trooper explained the field sobriety tests, he observed that the defendant was swaying back and forth and had trouble maintaining his balance (Tr. I:19, 23, 26, 29). The trooper also observed that the defendant was in a full sweat (despite wearing only a light winter jacket over a dress shirt and sweater in

[3] Later, when the trooper searched the defendant's car, he found several items that appeared to be marijuana and marijuana paraphernalia (Tr. I:33-36).

thirty-degree weather), and the arteries on the sides of his neck were quickly, visibly palpitating (Tr. I:23-24).

When the trooper asked the defendant to lift his foot six inches above the ground and hold it for thirty seconds, the defendant splayed his arms out for balance and began hopping after only ten seconds (Tr. I:26).[4] The defendant attempted the test a second time, and although he managed to keep his foot up for thirty seconds, he had to use his arms to balance and appeared unsteady as he put his foot down (Tr. I:26).

When the trooper asked the defendant to walk nine steps forwards, turn, and walk nine steps back, the defendant used his arms for balance; kept stepping on his toes and losing balance; walked ten steps out instead of nine; and did not count the steps out loud as instructed (Tr. I:30).

The defendant was able to recite the requested portion of the alphabet (Tr. I:31).

[4] Although the defendant had previously injured his back, he stated that it would not prevent him from lifting his foot (Tr. I:20).

The trooper had ten years of experience as an officer, and he was trained to perform field sobriety tests and recognize alcohol and marijuana impairment (Tr. I:4-6). Over the defendant's objection, the trooper opined that, based on the defendant's behavior, he was under the influence of alcohol and marijuana (Tr. I:32).

ARGUMENT

I. THE DEFENDANT'S CONVICTION FOR OUI INTOXICATING LIQUOR WAS PROPER BECAUSE THE INTRODUCTION OF EVIDENCE RELATED TO MARIJUANA DID NOT CONSTRUCTIVELY AMEND THE COMPLAINT, THE COMPLAINT ADEQUATELY NOTIFIED THE DEFENDANT OF THE CHARGE, AND THE JUDGE PROPERLY INSTRUCTED THE JURY ON THE LAW.

The defendant argues that the concurrent charges of OUI intoxicating liquor and OUI marijuana caused reversable error by: constructively amending the complaint during the trial (D.Br. 16); rendering the complaints deficient (D.Br. 23); and producing a general verdict (D.Br. 27). The defendant's arguments all rest on the improper assumption that evidence of the defendant's marijuana intoxication could not properly be considered towards his OUI intoxicating liquor conviction. This is a misunderstanding of the OUI statute. OUI intoxicating liquor merely requires that

alcohol be a contributing cause to the defendant's intoxication rather than the sole cause. The Commonwealth was entitled to provide evidence of other causes of the defendant's resulting intoxication. Therefore, the complaint and verdict were proper.

A. The Complaint Was Not Constructively Amended Because A Person Commits The Crime Of OUI Intoxicating Liquor Even When Factors Other Than Alcohol Contribute To The Person's Impairment.

The defendant argues that the complaint, which charged him with both OUI intoxicating liquor and OUI drugs, was constructively amended when the Commonwealth introduced evidence that he was under the influence of alcohol and marijuana (D.Br. 16; CA. 3-4; Tr. I:32). Because he objected below (Tr. I:32), this court will review for prejudicial error. Commonwealth v. Williams, 73 Mass. App. Ct. 833, 836 (2009).[5] As shown below, there was no error, and thus no prejudicial error.

[5] The defendant improperly relies on the standard of review for constructive amendments to indictments, which places a lower burden on the defendant (D.B. 17 n.10). See Commonwealth v. Bynoe, 49 Mass. App. Ct. 687, 693 (2000) (distinguishing between standards of review for constructive amendment to indictment and constructive amendment to complaint).